THE HIGH COURT OF MADHYA PRADESH: JABALPUR

(Division Bench)

W.P. No. 7373/2020

Maa Vaishno Enterprises and others ..… Petitioners

Versus

State of Madhya Pradesh and another ….. Respondents

WITH

W.P. No. 7389/2020

M/s Gwalior Wines (Limited Liability Partnership) ....…Petitioner

Versus

State of Madhya Pradesh and others ….. Respondents

W.P. No. 7472/2020

M/s Tika Ram Kori and Co. ....…Petitioner

Versus

State of Madhya Pradesh and others ….. Respondents

W.P. No. 7473/2020

Sangam Enterprises ....…Petitioner

Versus

State of Madhya Pradesh and others ….. Respondents

W.P. No. 7474/2020

Ashish Jaiswal ....…Petitioner

Versus

State of Madhya Pradesh and others ….. Respondents

W.P. No. 7490/2020

M/s Pandey Associates ....…Petitioner

Versus

State of Madhya Pradesh and others ….. Respondents

W.P. No. 7520/2020

Gopal Associates ....…Petitioner

Versus

State of Madhya Pradesh and others ….. Respondents

W.P. No. 7567/2020

Manish Rai and another ......Petitioners

Versus

Commercial Tax Department and others ….. Respondents

W.P. No. 7576/2020

Rajesh Singh Thakur ....…Petitioner

Versus

State of Madhya Pradesh and others ….. Respondents

W.P. No. 7577/2020

Rajesh Singh Thakur ......Petitioner

Versus

State of Madhya Pradesh and others ….. Respondents

W.P. No. 7578/2020

Lakhan Jaiswal ......Petitioner

Versus

State of Madhya Pradesh and others ….. Respondents

W.P. No. 7738/2020

Mahakali Traders A Partnership Firm …... Petitioner

Versus

State of Madhya Pradesh and others ….. Respondents

W.P. No. 7764/2020

M/s Malwa Wines India ......Petitioner

Versus

State of Madhya Pradesh and others ….. Respondents

W.P. No. 7767/2020

Vino Trading Pvt. Ltd. ….Petitioner

Versus

State of Madhya Pradesh and others ….. Respondents

W.P. No. 7771/2020

RSKS Reality Pvt. Ltd. ….Petitioner

Versus

State of Madhya Pradesh and others ….. Respondents

W.P. No. 7804/2020

M/s Mahismati and Co. ….Petitioner

Versus

State of Madhya Pradesh and others ….. Respondents

W.P. No. 7805/2020

M/s Mandla Syndicate ….Petitioner

Versus

State of Madhya Pradesh and others ….. Respondents

W.P. No. 7808/2020

M/s Shri Ganga Group ….Petitioner

Versus

State of Madhya Pradesh and others ….. Respondents

W.P. No. 7810/2020

Arti Shivhare ….Petitioner

Versus

State of Madhya Pradesh and another ….. Respondents

W.P. No. 7811/2020

Ajay Yadav and another ….Petitioners
Versus
State of Madhya Pradesh and others ….. Respondents

W.P. No. 7812/2020

Ajay Shivhare and others ….Petitioners
Versus
State of Madhya Pradesh and others ….. Respondents

W.P. No. 7815/2020

M/s Mahismati and Co. and others ….Petitioners
Versus
State of Madhya Pradesh and others ….. Respondents

W.P. No. 7867/2020

Ashish Jaiswal ...…Petitioner
Versus
State of Madhya Pradesh and others ….. Respondents

W.P. No. 7918/2020

Pankaj Kumar Singh ...…Petitioner
Versus
State of Madhya Pradesh and others ….. Respondents

W.P. No. 8016/2020

M/s Raghav Sarkar and Associates & others ...Petitioners

Versus
State of Madhya Pradesh and others ….. Respondents

W.P. No. 8084/2020

Brijesh Kumar Pandey ….....Petitioner
Versus
State of Madhya Pradesh and others ….. Respondents

W.P. No. 8131/2020

Danbahadur Singh …....Petitioner
Versus
State of Madhya Pradesh and others ….. Respondents

W.P. No. 8137/2020

Adarsh Kumar Singh …....Petitioner
Versus
State of Madhya Pradesh and others ….. Respondents

W.P. No. 8139/2020

M/s Awadh Associates …....Petitioner

Versus

State of Madhya Pradesh and others ….. Respondents

W.P. No. 8153/2020

Shiva Pandey …....Petitioner

Versus

State of Madhya Pradesh and others ….. Respondents

W.P. No. 8159/2020

Vaishali Shivhare …....Petitioner

Versus

State of Madhya Pradesh and others ….. Respondents

W.P. No. 8160/2020

Angrezy Deshi Karkeli Samouh Proprietor …....Petitioner

Versus

State of Madhya Pradesh and others ….. Respondents

W.P. No. 8259/2020

Aman Jaiswal …....Petitioner

Versus

State of Madhya Pradesh and others ….. Respondents

W.P. No. 8260/2020

Nilesh Rathor …....Petitioner

Versus

State of Madhya Pradesh and others ….. Respondents

W.P. No. 8363/2020

Rajendra Rai & others …....Petitioners

Versus

State of Madhya Pradesh and others ….. Respondents

W.P. No. 8365/2020

Ashok Rai …....Petitioner

Versus

State of Madhya Pradesh and others ….. Respondents

AND

W.P. No. 8575/2020

Jai Maa Kaila Devi Infrahight Pvt. Ltd. …....Petitioner

Versus

State of Madhya Pradesh and others ….. Respondents

Coram:

Hon'ble Shri Justice Ajay Kumar Mittal, Chief Justice
Hon'ble Shri Justice Vijay Kumar Shukla

Presence:

Mr. Mukul Rohatgi, Senior Advocate, Mr. Naman Nagrath, Senior Advocate with Mr. Rahul Diwakar, Mr. Himanshu Mishra, Mr. Kapil Wadhwa and Mr. Anvesh Shrivastava, Advocates for the petitioners in WP Nos.7373/2020, 7472/2020, 7473/2020, 7474/2020, 7738/2020, 7764/2020, 7767/2020, 7771/2020, 7804/2020, 7805/2020, 7808/2020, 7811/2020, 7812/2020, 7815/2020, 8016/2020, 8084/2020, 8153/2020, 8363/2020, 8365/2020 & WP No.8575/2020.

Mr. Sanjay Agrawal, Advocate for the petitioners in WP Nos.7490/2020, 7520/2020, 8131/2020, 8137/2020, 8139/2020, 8159/2020 & WP No. 8260/2020.

Mr. Sanjay Kumar Verma, Advocate for the petitioner in WP No. 8259/2020.

Ms. Gunjan Chowksey, Mr. Shantanu Srivastava and Mr. Manu Maheshwari, Advocates for the petitioners in WP Nos.7567/2020, 7576/2020, 7577/2020 and WP No.7578/2020.

Mr. M.P.S. Raghuvanshi and Mr. Alok Katare, Advocates for the petitioner in W.P. No.7389/2020.

Mr. Siddharth Gulatee, Advocate for petitioner in WP No.7810/2020.

Mr. Sanjay Kumar Patel, Advocate for the petitioners in WP Nos.7867/2020 & WP No.8160/2020.

Mr. Rakesh Dwivedi and Mr. Bhupendra Kumar Mishra, Advocates for the petitioner in WP No.7918/2020.

Mr. Tushar Mehta, Solicitor General of India, Mr. P.K. Kaurav, Advocate General with Mr. Saurabh Mishra, Additional Advocate General and Mr. Swapnil Ganguly, Deputy Advocate General for the respondents-State.

Heard through Video Conferencing & Reserved on: 29.6.2020

O R D E R

(Passed on this 22nd day of July, 2020)

Per Ajay Kumar Mittal, Chief Justice:

This order shall dispose of a bunch of 37 writ petitions preferred by the petitioners under Article 226 of the Constitution of India bearing WP Nos.7373, 7389, 7472, 7473, 7474, 7490, 7520, 7567, 7576, 7577, 7578, 7738, 7764, 7767, 7771, 7804, 7805, 7808, 7810, 7811, 7812, 7815, 7867, 7918, 8016, 8084, 8131, 8137, 8139, 8153, 8159, 8160, 8259, 8260, 8363, 8365 and 8575 of 2020, as learned counsel for the parties are agreed that common questions of fact and law are involved therein. However, the facts are being extracted from WP No.7373/2020 wherein the auction process conducted by the respondents for grant of licence for the retail liquor shops has been called in question by the petitioners and further directions have been sought against the respondents to revalue the same; restrain them to issue licences to the petitioners; refund the money deposited by the petitioners and further to set aside the offers made by the petitioners and acceptance thereof by the respondents-State. In W.P. Nos.7520, 7567, 7576, 7578, 8259 and 8260 of 2020, the petitioners, in addition, apart from assailing the Amended Excise Policy dated 23.05.2020, have also challenged the Excise Policy 2020-21 dated 25.02.2020 specifically Clauses 9.6, 10.1.4, 10.1.5, 10.1.9, 44 and 48 thereof.

2. The marathon pleadings in the form of petition, response, rejoinder, counter-rejoinder, affidavits, additional affidavits and interlocutory applications have been filed, which has necessitated referring to them in detail in succeeding paragraphs.

3. The essential facts for the just decision of the questions involved herein, as narrated in W.P. No.7373/2020 may be noticed. The petitioners, who are 30 in number, are liquor contractors, whose highest offers were

accepted or who have opted for renewal of their previous years licences with increased licence fees to run the shops for one year w.e.f. 01.04.2020 to 31.03.2021. The petitioners have been declared as successful bidders to run the respective liquor shops in various districts of State of Madhya Pradesh. In para 5.16 of the petition, a chart has been incorporated showing the districts and groups which have been allotted to the petitioners in respective districts of the State. The price of allotment of such shops/groups has also been enumerated against each petitioner.

4. The retail sale of foreign and country liquor in the State of Madhya Pradesh is done by retail shops for which licences are issued to individuals in accordance with the Excise policy framed by the State Government every year. The State Government formulated the Excise policy for the financial year 2020-21, which was notified in Madhya Pradesh Gazette on 25.02.2020 whereunder, the licence period of the licensees had to commence from 01.04.2020 and to conclude on 31.03.2021. A perusal of Clause 1 of the policy shows the mode in which the licences for the shops were to be issued. As per clause 1(1) thereof, the entire districts of four metropolitan cities of the State i.e. Indore, Bhopal, Jabalpur and Gwalior were to be geographically divided into two groups having both the nature of liquor shops as far as possible. Clause 1(2) provided the remaining 12 Districts having Municipal Corporations i.e. Sagar, Ratlam, Ujjain, Khandwa, Burhanpur, Dewas, Satna, Katni, Rewa, Singrauli, Chhindwara and Morena to have single group of liquor shops. The execution of the shops referred to in sub-clause (1) and (2), was to be done through e-tendering cum auction and the reserve price for the shops was fixed 25% higher than the previous year's annual value. As per Clause 1(3), except for the districts mentioned in Clause 1(1) and 1(2), in all other districts, the annual price of single groups of liquor shops prevailing in the year 2019-20 will be increased by 25% for the year 2020-21 and will be executed according to previous year's system i.e. through renewal, lottery and e-tender (closed bid and auction). As per Clause 68 thereof, the process of renewal and lottery of the shops other than the four major cities and 12 districts was to commence from 29.02.2020 and this process was to end on 9th March, 2020 with the examination, opening and disposal of such applications

for renewal and lottery by the District Committee. The first round for e-tendering (closed bid and auction) for four Metropolitan Cities of the State i.e. Bhopal, Indore, Jabalpur and Gwalior and 12 districts was to commence from 5th March, 2020 with the downloading and submission of e-tender (closed bids) and e-tender (offers). The e-tender (closed bid) and online tender applications were to be opened on 11th March, 2020 and the auction was to be done on 12th March, 2020. In second round, programme of e-tender (closed bid and auction) of four Metropolitan Cities and 12 Districts of Municipal Corporation of first round and other groups of renewal and lottery through e-tender (closed bid and auction) was to commence on 14th March, 2020 and for opening of e-tender (closed bid) on-line applications the date was fixed as 19th March, 2020 and for e-tender (auction), the date was fixed as 20th March, 2020. Similarly, for the groups for which e-tender (closed bid and auction) was to be done and they were left despite second round, the programme of third round was to commence from 21st March and was upto 25th March, 2020 with their e-tender (auction). The fourth round for execution of groups was fixed for the remaining groups from 26th March to 29th March, 2020. Clause 2 of the policy provided that country (domestic)/foreign liquor shops in off categories located in the State were to be converted into on-category through shop bar licence after charging additional price as an option as per rules and licence for shop bars will be given on annual licence fee of 2% of the annual value of the liquor shop. The relevant clauses of the Excise Policy 2020-21 (Annexure P-1), read as under:-

"वाणिज्यिक कर विभाग
मंत्रालय, वल्लभ भवन, भोपाल

कार्यालय आबकारी आयुक्त, मध्यप्रदेश, मोतीमहल, ग्वालियर
देशी/विदेशी मदिरा की फुटकर बिक्री की दुकानों के समूह/एकल समूहों के निष्पादन की व्यवस्था वर्ष 2020–21

ग्वालियर, दिनांक 25 फरवरी 2020

क्रमांक सात–ठेका/2020–21/307 भोपालः– सर्वसाधारण की जानकारी एवं आबकारी के फुटकर ठेकेदारों की विशेष जानकारी के लिये राज्य शासन के आदेशानुसार यह सूचना प्रकाशित की जाती है कि वर्ष 2020–21 के लिये, अर्थात् दिनांक 01 अप्रैल 2020 से दिनांक 31 मार्च 2021 तक की अवधि के लिये, सम्पूर्ण मध्यप्रदेश में वर्ष 2019–20 में संचालित देशी/विदेशी मदिरा की फुटकर बिक्री की दुकानों के समूह/एकल समूहों का निष्पादन निम्न प्रक्रिया एवं शर्तों के अधीन वर्ष 2019–20 के वार्षिक मूल्य में 25 प्रतिशत की वृद्धि कर वर्ष

2020–21 हेतु आरक्षित मूल्य निर्धारित किया जाकर संबंधित जिला कलेक्टर की अध्यक्षता में गठित जिला समिति द्वारा घोषित निष्पादन स्थलों पर किया जाएगा । शासन को यह अधिकार होगा कि वर्ष 2020–21 के लिये स्वीकृत आबकारी व्यवस्था में वर्ष 2020–21 अवधि के दौरान यथा आवश्यक परिवर्तन कर सकेगा ।

1. निष्पादन की प्रक्रिया :–

वर्ष 2020–21 के लिए मदिरा दुकानों का निष्पादन शासन द्वारा निर्धारित प्रक्रिया एवं मापदण्डों के अनुसार निम्न प्रक्रिया के अधीन किया जायेगाः–

(1) 04 बड़े महानगर यथा इन्दौर, भोपाल, जबलपुर एवं ग्वालियर जिलों में भौगोलिक निरन्तरता के आधार पर मदिरा दुकानों के दो–दो समूह बनाये जावे, जिसमें यथासम्भव दोनों स्वरूप की मदिरा दुकानें हों

(2) शेष 12 नगरनिगमों में जिले यथा सागर, रतलाम, उज्जैन, खण्डवा, बुरहानपुर, देवास, सतना, कटनी, रीवा, सिंगरौली, छिंदवाड़ा एवं मुरैना में मदिरा दुकानों का एकल समूह बनाया जावे ।

उक्त बिन्दु (1) एवं (2) के दुकानों का निष्पादन ई–टेण्डर सह नीलामी से होगा एवं आरक्षित मूल्य पूर्व वर्ष के वार्षिक मूल्य से 25 प्रतिशत बढ़ाकर रखा जावे।

(3) उपरोक्त बिन्दु (1) एवं (2) में उल्लेखित जिलों को छोड़कर राज्य के अन्य समस्त जिलों में वर्ष 2019–20 में प्रचलित मदिरा दुकानों के एकल समूहों के वार्षिक मूल्य में वर्ष 2020–21 हेतु 25 प्रतिशत की वृद्धि कर आरक्षित मूल्य निर्धारित किया जाकर, उनका निष्पादन वर्ष 2019–20 में प्रचलित व्यवस्था अनुसार अर्थात् नवीनीकरण, लॉटरी एवं ई–टेण्डर (क्लोज बिड एवं ऑक्शन) के माध्यम से किया जावे ।

(4) इस हेतु प्रथमतः वर्ष 2019–20 के मदिरा दुकानों के एकल समूहों के अनुज्ञप्तिधारियों से नवीनीकरण हेतु प्राप्त आवेदन पत्रों तथा अन्य इच्छुक पात्र आवेदकों से प्राप्त लॉटरी आवेदन पत्रों को सम्मलित करते हुए समग्र में यदि जिले में संचालित देशी/विदेशी मदिरा दुकानों के एकल समूहों पर वर्ष 2020–21 के लिए निर्धारित आरक्षित मूल्य में निहित राजस्व के 80 प्रतिशत अथवा उससे अधिक राशि के आवेदन पत्र प्राप्त होते हैं तो ऐसी, समस्त आवेदित समूहों का निष्पादन जिले में गठित जिला समिति द्वारा पात्र आवेदकों के हित में किया जायेगा ।

(5) वर्ष 2020–21 के लिए नवीनीकरण आवेदन तथा लॉटरी आवेदन पत्रों के माध्यम से निष्पादन की कार्यवाही उपरान्त निष्पादन से शेष रहे समूहों का निष्पादन शासन द्वारा निर्धारित प्रक्रिया एवं मापदण्डों के अनुसार ई–टेण्डर (क्लोज बिड एवं ऑक्शन) के माध्यम से किया जायेगा ।''

''(36) मदिरा दुकानों से बिक्री का समयः–

मदिरा की फुटकर बिक्री की दुकानों की साफ–सफाई तथा मदिरा के प्रारंभिक संग्रह, आमद, विक्रय एवं अंतिम संग्रह के दैनिक लेखे की पंजियों को पूर्ण/संधारित किये जाने के लिये मदिरा दुकानें प्रातः 8.30 बजे से खोली जायेंगी । प्रातः 8.30 बजे से प्रातः 9.30 बजे तक का समय लेखा संधारण के लिए एवं मदिरा विक्रय का समय प्रातः 9.30 बजे से रात्रि में 11.30 बजे तक रहेगा।

रेस्टोरेन्ट, होटल, रिसोर्ट तथा क्लब बार लायसेंस के अन्तर्गत परिसर में विदेशी मदिरा की बिक्री का समय प्रातः 10.00 बजे से रात्रि 11.30 बजे तक एवं उपभोग का समय रात्रि 12.00 बजे तक रहेगा।''

5. The petitioners participated in the tender process for grant of licences to run the retail licensed shops in various districts across the State of Madhya Pradesh and their highest offers were accepted for their respective shops/groups. A specimen copy of the acceptance letter issued to petitioner No.1 is on record as Annexure P-2, which reads as under:-

"कार्यालय सहायक आबकारी आयुक्त, जिला–जबलपुर (म.प्र.)
(E-mail: deo.mpedjbp@mp.gov.in PH-0761-2624358)

क्रमांक / आब. / ठेका / 2020 / 737 जबलपुर दिनांक 16 / 3 / 2020

प्रति,

मेसर्स मॉ वैष्णो इंटरप्राईजेज
भागीदार – श्री आशीष शिवहरे
पिता श्री रघुवर दयाल शिवहरे
निवासी–डी–10, बी–ब्लॉक,
आदर्श नगर, नर्मदा रोड, जबलपुर (म.प्र.)

विषयः– वर्ष 2020–21 हेतु देशी / विदेशी मदिरा की फुटकर बिक्री की दुकानों के समूह / एकल समूहों के निष्पादन बाबत्।

संदर्भः– मध्यप्रदेश राजपत्र (आसाधारण) क्रमांक–77 दिनांक 25 / 02 / 2020 एवं आबकारी आयुक्त, मध्यप्रदेश ग्वालियर के निर्देश क्रमांक–7–ठेका / 2020–21 / 437 भोपाल दिनांक 24.02.2020

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उपरोक्त विषयांतर्गत लेख है कि जबलपुर जिले की देशी / विदेशी मदिरा की फुटकर बिक्री की दुकानों के एकल समूहों के लायसेंस ई–टेण्डर (क्लोज बिड एवं ऑक्शन) वर्ष 2020–21 की प्रक्रिया में एकल समूह जेबीपी / एफ–1 जबलपुर उत्तर में सम्मिलित देशी / विदेशी मदिरा दुकानों के लिए आपके द्वारा प्रस्तुत उच्चतम ऑफर राशि रूपये 2,95,82,69,590 / – के अनुक्रम में दिनांक 16 / 03 / 2020 को जिला समिति द्वारा एकल समूह क्रमांक–जेबीपी / एफ–1 जबलपुर उत्तर समूह को वर्ष 2020–21 हेतु अर्थात दिनांक 01 अप्रैल 2020 से दिनांक 31 मार्च 2021 तक वार्षिक मूल्य 2,95,82,69,590 / – के प्रतिफल में स्वीकार कर आपके पक्ष में निष्पादित किया गया है।

अतः मध्यप्रदेश राजपत्र (आसाधारण) क्रमांक–77 दिनांक 25 / 02 / 2020 में प्रकाशित देशी / विदेशी मदिरा के निष्पादन की व्यवस्था की कंडिका क्रमांक–9.4 के अनुसार आपके द्वारा निष्पादित समूह की निर्धारित 5 प्रतिशत की धरोहर राशि रूपये 14,79,13,480 / – के विरूद्ध पोर्टल पर राशि रूपये 3,05,82,700 / – जमा की गई थी।

अतः राजपत्र की कंडिका क्रमांक 9.4 के अनुसार अवशेष धरोहर राशि रूपये 11,73,30,780 / – निष्पादन की तिथि दिनांक 16 मार्च 2020 से 3 दिवस के अंदर अर्थात दिनांक 19 मार्च 2020 तक साईबर ट्रेजरी में ऑनलाईन जमा किया जाना सुनिश्चित करें साथ ही पोर्टल पर अपलोड किये गये समस्त वांछित अभिलेख निर्धारित प्रारूप में मूलतः तत्काल इस कार्यालय में प्रस्तुत किया जाना सुनिश्चित करें।

मध्यप्रदेश राजपत्र (आसाधारण) क्रमांक–77 दिनांक 25 / 02 / 2020 में प्रकाशित देशी / विदेशी मदिरा के निष्पादन की व्यवस्था की कंडिका क्रमांक–10 के अनुसार निर्धारित 11 प्रतिशत् की प्रतिभूति की राशि रूपये 30,91,39,173 / – को जबलपुर जिले के सहायक आबकारी आयुक्त के पक्ष में जारी किसी भी राष्ट्रीयकृत / अनुसूचित / क्षेत्रीय ग्रामीण बैंक की स्थानीय शाखा में देय बैंक ड्राफ्ट / बैंकर्स चैक / बैंक कैश आर्डर / साईबर ट्रेजरी में ऑनलाईन जमा / सावधि जमा के रूप में प्रस्तुत की जा सकेगी। प्रतिभूति की राशि के बैंक गारंटी होने की दशा में भारतीय स्टॉम्प अधिनियम के अनुसार 0.25 percent of amount, subject

to a maximum of twenty five thousand rupees नान् ज्यूडिशियल स्टाम्प पेपर पर तैयार कर प्रस्तुत की जा सकेगी । बैंक गारंटी/सावधि जमा की परिपक्वता अवधि दिनांक 30 अप्रैल 2021 तक होगी।

मध्यप्रदेश राजपत्र (आसाधारण) क्रमांक–77 दिनांक 25/02/2020 में प्रकाशित देशी/विदेशी मदिरा के निष्पादन की व्यवस्था की कंडिका क्रमांक–21 के अनुसार निर्धारित प्रारूप में प्रतिरूप करार रूपये 500/– के नॉन ज्यूडिशियल स्टाम्प पेपर पर तैयार कर दिनांक 19/03/2020 तक जमा किया जाना सुनिश्चित करें ।

मध्यप्रदेश राजपत्र (आसाधारण) क्रमांक–77 दिनांक 25/02/2020 में प्रकाशित देशी/विदेशी मदिरा के निष्पादन की व्यवस्था की कंडिका क्रमांक–20 के अनुसार वार्षिक न्यूनतम प्रत्याभूत ड्यूटी के आधार पर एक पक्ष के समानुपातिक न्यूनतम प्रत्याभूत ड्यूटी की राशि के समतुल्य राशि के माह मई 2020 से माह जनवरी 2021 तक प्रत्येक पक्ष की पहली तिथि में वर्तमान में किसी भी राष्ट्रीयकृत/अनुसूचित/क्षेत्रीय/ग्रामीण बैंक में संधारित बचत/चालू खाते से जबलपुर जिले के सहायक आबकारी आयुक्त के पक्ष में जारी अट्ठारह (18) पोस्ट डेटेड चैक अतिरिक्त प्रतिभूति के रूप में दिनांक 25/03/2020 तक प्रस्तुत करना सुनिश्चित करें ।

यदि आपके द्वारा उपरोक्तानुसार वांछित औपचारिकताएँ विहित समयसीमा में पूर्ण नहीं की जाती है तो उक्त निष्पादन को निरस्त करते हुए आपके द्वारा जमा की गई धरोहर राशि को राजसात कर लिया जावेगा तथा पृथक से बिना किसी अन्य पूर्व सूचना के आपको निष्पादित समूह का निष्पादन ई–टेंडर के माध्यम से किया जावेगा व आपके उत्तरदायित्व में उक्त समूह का वर्ष 2020–21 के लिए सार्वजनिक रूप से पुनः निष्पादन करने में यदि कोई खिसारा निकलता है, तो यह खिसारे की राशि आपसे भू–राजस्व की भांति वसूल की जावेगी ।

(कलेक्टर महोदय द्वारा अनुमोदित)
संलग्न–बैंक गारंटी का प्रारूप

सही/
(सत्यनारायण दुबे)
सहायक आबकारी आयुक्त एवं सचिव जिला समिति
जिला–जबलपुर (म.प्र.)''

6. In around 30 districts in Madhya Pradesh, the licence for retail liquor shops were given on renewal/lottery and for remaining districts, excluding the four metropolitan cities i.e. Bhopal, Indore, Jabalpur and Gwalior, the entire district was categorised as one single group and the entire group was auctioned by online auction process. So far as the above four metropolitan cities, the districts were divided geographically into two halves having equal number of shops and these groups were also auctioned by online auction process. As such, in as many as 21 districts the licence for retail liquor shops were given through the process of renewal and in 16 districts, the auction was conducted. The reserve price for all groups of shops whether it was renewal of licence or auction, the same was determined to be 25% higher than the licence fees and minimum duty amount which was paid for the year 2019-20. The structure of taxation is that 5% of entire bids is to be licence fee and 95% of the bid is minimum duty payable by retailer that is divided into 24 fortnightly

installments. Payment of duty is mandatory whether or not the retailer lifts the liquor and quantity of duty payable determines the quantity of liquor to be purchased by the retailer. In terms of Clause 1 of the Excise Policy, the respective petitioners got the renewal of their shops in 21 Districts and Groups whereas in 16 Districts and Groups, they had submitted fresh tenders and were declared as successful bidders. The particulars of the petitioners who got the allotment through the process of renewal and fresh tenders, are given as under:-

Sr.No.	**Petitioner No.**	**District**	**Amount (in Rs.)**
Renewal District & Groups			
1.	Petitioner No.04	Seoni (4 Groups)	34.83 Crore
2.	Petitioner No.05	Seoni (4 Groups)	28.00 Crore
3.	Petitioner No.06	Seoni (1 Group)	08.00 Crore
4.	Petitioner No.07	Narsinghpur (7 Groups)	71.00 Crore
5.	Petitioner No.08	Damoh (3 Groups)	45.00 Crore
6.	Petitioner No.09	Damoh (1 Group)	07.00 Crore
7.	Petitioner No.11	Anuppur (1 Group)	08.21 Crore
8.	Petitioner No.12	Anuppur (1 Group)	03.57 Crore
9.	Petitioner No.13	Anuppur (1 Group)	10.23 Crore
10.	Petitioner No.14	Anuppur (1 Group)	08.17 Crore
11.	Petitioner No.16	Narsinghpur (2 Groups)	10.00 Crore
12.	Petitioner No.17	Narsinghpur (2 Groups)	27.00 Crore
13.	Petitioner No.19	Vidisha (1 Group)	6,32,77,500
14.	Petitioner No.19	Seoni (1 Group)	14,46,25,900
15.	Petitioner No.19	Hoshangabad (1 Group)	8,67,45,000
16.	Petitioner No.19	Shajapur (1 Group)	16,09,27,505
17.	Petitioner No.20	Raisen-Begamganj (1 Group)	11,01,00,002
18.	Petitioner No.21	Shajapur (1 Group)	2,37,81,251
19.	Petitioner No.22	Shajapur (1 Group)	4,53,00,006
20.	Petitioner No.28	Ashok Nagar (1 Group)	-
21.	Petitioner No.29	Guna (1 Group)	-
Tender District & Groups			
22.	Petitioner No.01	Jabalpur (Entire District)	594.00 Crore
23.	Petitioner No.02	Chhindwara (Entire District)	294.00 Crore
24.	Petitioner No.03	Katni (Entire District)	231.00 Crore
25.	Petitioner No.10	Balaghat (Entire District)	268.00 Crore

26.	Petitioner No.15	Ratlam (Entire District)	218.00 Crore
27.	Petitioner No.18	Bhopal (Entire District)	397.46 Crore
28.	Petitioner No.19	Alirajpur (1 Group)	18,42,00,000
29.	Petitioner No.21	Hoshangabad (1 Group)	12,80,00,000
30.	Petitioner No.22	Alirajpur (1 Group)	32,90,70,000
31.	Petitioner No.22	Dhar (1 Group)	41,66,00,000
32.	Petitioner No.23	Shivpuri (Entire District)	204,12,00,000
33.	Petitioner No.24	Dewas (Entire District)	239.00 Crore
34.	Petitioner No.25	Indore A (Half District)	643.32 Crore
35.	Petitioner No.25	Indore B (Half District)	522.34 Crore
36.	Petitioner No.27	Neemuch (16 Country Liquors)	34.20 Crore
37.	Petitioner No.30	Rajgarh (1 Group)	-

7. The case of the petitioners is that the process of completing the auction and declaring the petitioners as successful bidders stood concluded in the first week of March, 2020 for most of the districts and shops in the State. However, prior to completion of the last financial year 2019-2020, which was to conclude on 31.03.2020 and prior to commencement of the next Excise financial year i.e. 2020-21, Coronavirus (COVID-19) disease broke out globally and therefore, it was declared as pandemic by the World Health Organization (WHO) on 11.03.2020. The disease also started affecting the major population of the country, as a result of which, the Central Government, keeping in view the global experiences of countries which had been successful in containing the spread of COVID-19 and the WHO guidelines, took a conscious decision to forcefully impose social distancing to contain the spread of the said pandemic. The Central Government took several proactive preventive and mitigating measures and also issued advisories to the State Governments to contain the spread of the virus. Even the rail and the domestic air traffic services were also suspended temporarily. The State also followed the advisories and as one of such measures, the District Magistrates of various districts from 21st March, 2020 onwards, vide separate orders in their respective districts, which are contained in Annexure P-4, directed for stopping the operation of the shop bars/*Ahatas* attached to liquor shops in order to effectively implement the social distancing.

8. However, in order to maintain uniformity in the measures adopted as well as effective implementation thereof, the National Disaster Management Authority (NDMA) in exercise of the powers under section 6(2)(i) of the Disaster Management Act, 2005 (for short "the Act of 2005"), issued an order dated 24.03.2020 directing the Departments of Government of India, the State/Union Territory Governments to take effective measures to prevent the spread of COVID-19 in the country and announced that the entire country shall be in complete lockdown from 25th March, 2020 for a period of 21 days while ensuring maintenance of essential services and supplies, including health and infrastructure. Accordingly, vide order dated 24th March, 2020 (Annexure P-3), the Ministry of Home Affairs, Government of India in exercise of powers conferred under Section 10(2)(i) of the Act of 2005 also issued the guidelines for their strict implementation.

9. It is averred that no sooner the lockdown of 21 days was to complete on 15.04.2020 than the Central Government vide separate order passed on 14.04.2020 (Annexure P-5) extended the same for a further period till 03.05.2020 as the cases of people getting infected with the virus were constantly increasing. However, the Central as well as the State Government was time and again issuing the directions to operate only the shops and establishments providing essential services for a very limited period of time. Accordingly, vide order dated 28th March, 2020, the operation of liquor and cannabis shops was also directed to be stopped. The order dated 28th March, 2020 is reproduced as under:-

"मध्यप्रदेश शासन
वाणिज्यिक कर विभाग
मंत्रालय वल्लभ भवन भोपाल

क्र. एफ बी–01–06/2020/पॉच, भोपाल, दिनांक 28 मार्च 2020

प्रति,

समस्त कलेक्टर
मध्यप्रदेश

विषयः– प्रदेश में नोवल कोरोना वायरस (COVID-19) की रोकथाम के लिये घोषित 21 दिवस लॉक–डाउन अवधि के कारण मदिरा/भांग विक्रय की दुकानों को बंद करने के संबंध में ।

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राष्ट्रीय विपदा कोरोना वायरस के फैलाव पर नियंत्रण तथा बचाव के प्रयासों के तहत् दिनांक 28.03.2020 से दिनांक 14.04.2020 तक संपूर्ण प्रदेश में लॉकडाउन

रहने से अन्य व्यवसायिक प्रतिष्ठानों की भांति मदिरा एवं भांग दुकानों का संचालन बंद किया जाये। तदनुसार सभी लायसेंसियों को अवगत करावें ।

कृपया उपरोक्तानुसार अग्रिम कार्यवाही की जाना सुनिश्चित करें ।

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार
सही/–
(एस.डी. रिछारिया)
उप सचिव''

On 15.04.2020, the Ministry of Home Affairs, Government of India, issued consolidated guidelines on the measures to be taken by the State Governments for containment of Coronavirus in the country and Annexure 1 appended to the guidelines specifically provided that "there should be strict ban on sale of liquor, gutka, tobacco etc. and spitting should be strictly prohibited". In furtherance thereof, the State Government took a conscious decision not to permit the opening of the liquor shops and accordingly did not issue the licences for the year 2020-21. In this manner, almost a month had elapsed from the scheduled date of commencement of the licence i.e. 01.04.2020 without any business. The lockdown 2.0 is to be lifted on 04.05.2020. The Authorities have informed the petitioners that they shall be allowed to open the liquor shops with certain conditions, such as: the timings to run the shops shall be limited, the shop bars (*Ahatas*) shall not be allowed to be operated, the bars and the bars in the hotels shall be closed. This, in effect, has given rise to the grievance of the petitioners that till the first week of May, 2020, the licences to enable them to run the liquor shops have not been issued and they have not been permitted to run their shops even for a day. Since the petitioners have not been permitted to sell the liquor for one complete month, they shall not be able to recover the licence fee for the month of April, 2020. The petitioners participated in the tender process calculating and expecting certain amount of revenue by sale of liquor from the licensed premises keeping in view the specific guidelines and mandates of the Excise policy such as shopping hours provided for the liquor shops which are nearly 14 hours per day from 9.30 a.m. to 11.30 p.m. as per Clause 36 of the Excise policy and Rule VIII of the General License Conditions framed in exercise of the powers under Section 62 of the M.P. Excise Act, 1915 (hereinafter referred to as "the Excise Act"); the licence fee to be paid, permission to run the shop bars (*Ahatas*), the upset price of the shops, time

period of the licence, the minimum stock which was to be lifted etc. But, the precious time of more than a month out of total period of licence of 12 months has been lost without permission of any business. Moreover, numerous restrictions are being imposed on running of liquor shops for the time being resulting into opening of shops only for 6-7 hours out of allotted 14 hours per day, closures of bars, shop bars, pubs, restaurant and other restrictions on marriages and social events and gatherings etc. The problem of unemployment is generated and there are other uncertainties due to psychological effect for the remaining period of licence in the aftermath of the Covid-19 pandemic. In these circumstances, if the normal conditions which existed at the time of participation in the tender process are not made available to the petitioners and due to such major changes in the conditions at the behest of the respondents, the petitioners are not liable to pay the licence fee; the licence fee and duty amount is required to be revalued and as such it is prayed that the auction process conducted for grant of licence to run the retail liquor shops be quashed and money deposited by the petitioners be refunded to them. In this manner, the present petitions were filed by the petitioners.

10. Thereafter, the petitioners filed an application being **I.A. No.3995/2020** dated 4.5.2020 to bring subsequent events and documents on record to the effect that pursuant to filing of the petition, the State Government vide order dated 02.05.2020 (Annexure A-1) has taken a call to open the liquor shops and now compelling the petitioners to accept the licence on the new conditions on the same rate as were submitted by them at the time of submission of their bids. Simultaneously, the Assistant Commissioner, Excise, Bhopal has issued a letter dated 02.05.2020 (Annexure A-2) to some of the petitioners along with the licence for the year 2020-21, which have been sent through email with the further instructions to collect the original of the licence and complete the remaining formalities for the year 2020-21. It has been further averred that various orders have been issued since 1st May, 2020 pertaining to operation of liquor shops but without any clarity. On 4th May, 2020, the respondents have passed another order (Annexure A-4) that all the liquor shops in the three Red Zones districts i.e. Bhopal, Indore and Ujjain

shall remain closed while in other Red Zone districts the liquor shops are being allowed to open which do not fall in the urban/city area. Similarly, the shops falling in Orange Zone may be opened in all areas except the areas falling in the containment zone whereas the shops lying in green zones have been allowed to run in complete district from 7 a.m. to 7 p.m. The bifurcation done on the basis of such zones in districts is impossible in view of the Excise policy in vogue.

11. The return has been filed on behalf of the respondents-State on 18.05.2020 vide **I.A. No.4497/2020**, and *inter alia* it has been put-forth that the e-bids submitted by the petitioners were accepted. The allotment letters were already issued to the petitioners and consequently, all the mandatory payments required to be made under the Excise Policy 2020-21 have been made by many petitioners during the lockdown period only, which have been accepted. Even the licences have also been issued to all the successful bidders/petitioners and they have started operating the liquor shops. Therefore, the petition has rendered *infructuous*. It is further stated in the return that in pursuance to the Advisory dated 01.05.2020 issued by the Ministry of Home Affairs, Govt. of India, the State Government vide order dated 04.05.2020 has permitted the running of liquor shops from 05.05.2020 subject to certain terms and conditions. As such the social distancing, restricted timings and prohibition of bars/*Ahatas* would not cause any loss to the licencees in terms of sale of liquor. The said advisories are contained in Annexure R-3, which read as under:-

"मध्यप्रदेश शासन
वाणिज्यिक कर विभाग
मंत्रालय वल्लभ भवन भोपाल

क्र.–एफ बी–01–06/2020/2/पांच भोपाल दिनांक 04 मई 2020

प्रति,

समस्त कलेक्टर
मध्यप्रदेश

विषयः प्रदेश में मदिरा/भांग विक्रय की दुकानों का संचालन करने के संबंध में।
संदर्भः– इस विभाग का समसंख्यक पत्र दिनांक 28 मार्च 2020, 14 अप्रैल 2020 एवं 19 अप्रैल 2020

कृपया उपर्युक्त विषयांकित संदर्भित पत्रों का अवलोकन करें, जिसके द्वारा प्रदेश में मदिरा एवं भांग दुकानों को दिनांक 03 मई 2020 तक संचालन बंद किया गया था । उक्त आदेश में संशोधन करते हुए मदिरा एवं भांग दुकानें दिनांक 04 मई 2020 तक बंद रहेंगी ।

2/ प्रदेश में नोबल कोरोना वायरस (COVID-19) के अंतर्गत जोनवार वर्गीकृत जिलों में मदिरा एवं भांग दुकानों का संचालन दिनांक 05 मई 2020 से निम्नानुसार किया जावे :–

(i) प्रदेश में रेड जोन में आने वाले भोपाल, इन्दौर एवं उज्जैन जिले में मदिरा एवं भांग की समस्त दुकानें आगामी आदेश तक बंद रहेंगी ।

(ii) रेड जोन के अन्य जिलों जबलपुर, धार, बड़वानी, पूर्वी निमाड़ (खण्डवा), देवास एवं ग्वालियर जिलों की मुख्यालय की शहरी क्षेत्रों की दुकानों को छोड़कर अन्य क्षेत्रों की मदिरा एवं भांग की दुकानें संचालित की जायें ।

(iii) ऑरेंज जोन के अंतर्गत आने वाले जिले खरगौन, रायसेन, होशंगाबाद, रतलाम, आगर–मालवा, मंदसौर, सागर, शाजापुर, छिंदवाड़ा, अलीराजपुर, टीकमगढ़, शहडोल, श्योपुर, डिण्डोरी, बुरहानपुर, हरदा, बैतूल, विदिशा, मुरैना एवं रीवा के कंटेनमेंट एरिया को छोड़कर, शेष मदिरा एवं भांग दुकाने संचालित की जायें ।

(iv) ग्रीन जोन के अंतर्गत आने वाले जिलों की सभी मदिरा एवं भांग दुकानों का संचालन प्रारंभ की जाये।

3/ भारत सरकार, गृह मंत्रालय एवं इस विभाग द्वारा जारी SOP एवं 2 गज की दूरी आदि का पालन भी सुनिश्चित करें। तदनुसार सभी लायसेंसियों को अवगत करावें ।

कृपया उपरोक्तानुसार शीघ्र कार्यवाही की जाना सुनिश्चित करें ।

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार
सही/–
(एस. डी. रिछारिया)
उप सचिव''

12. The respondents have also filed a chart Annexure R-2 showing the date of issuance and operation of licences and the status of compliance made by the licensees. The relevant extract of the same, which is in Hindi, on being translated into English, reads as under:-

Sr.No	**Name of the Firm/ Licensee (Petitioner)**	**District**	**Date of Issue of Licence**	**Date of commencement of sale of Liquor**	**Current status of deposit of Earnest money, bank guarantee and post-dated cheques by the licensee as per rules/instructions**
1.	Maa Vishno Enterprisee	Jabalpur	4.5.2020	6.5.2020	EM deposited, BG & PDC not deposited
2.	Sundram Traders	Chhindwara	4.5.2020	6.5.2020	-do-
3.	Bhagwati Enterprises	Katni	4.5.2020	6.5.2020	-do-
4.	Maa Narmada Traders	Seoni	1.4.2020	6.5.2020	EM, BG & PDC deposited
5.	M/s Anand Singh Baghel	Seoni	1.4.2020	6.5.2020	-do-
6.	Raj Kumar Rai	Seoni	1.4.2020	6.5.2020	-do-
7.	Vanshika Constructions	Narsinghpur	31.3.2020	5.5.2020	-do-
8.	Sanjeet Rai	Damoh	1.4.2020	5.5.2020	-do-
9.	Ashish Rai	Damoh	1.4.2020	5.5.2020	-do-
10.	M/s Wainganga Enterprises	Balaghat	2.5.2020	6.5.2020	EM deposited, BG & PDC not deposited
11.	Devendra Verma	Anuppur	2.5.2020	6.5.2020	EM & BG deposited PDC not deposited

12.	Manmmet Singh Bhatia	Anuppur	2.5.2020	6.5.2020	-do-
13.	Niti Bhatia	Anuppur	2.5.2020	6.5.2020	-do-
14.	Dharmendra K Bhatt	Anuppur	2.5.2020	6.5.2020	-do-
15.	Chamunda Enterprises	Ratlam	3.5.2020	7.5.2020	EM deposited, BG & PDC not deposited
16.	Manish Jatt	Narsinghpur	31.3.2020	5.5.2020	EM, BG & PDC deposited
		Vidisha	2.5.2020	6.5.2020	-do-
		Hoshangabad	1.5.2020	7.5.2020	-do-
17.	Mukesh Bilwar	Narsinghpur	31.3.2020	5.5.2020	-do-
18.	Alcoactive Retail Traders Pvt. Ltd.	Bhopal	1.4.2020	-	EM deposited, BG & PDC not deposited
19.	Raisen Marketing Pvt. Ltd.	Shajapur	3.5.2020	6.5.2020	EM, BG & PDC deposited
		Vidisha	2.5.2020	6.5.2020	EM deposited, earlier BG deposited but BG of difference amount & PDC not deposited
		Alirajpur	2.5.2020	6.5.2020	EM & BG deposited PDC not deposited
		Hoshangabad	1.5.2020	-	EM, BG & PDC deposited
20.	Raisen Marketing	-	-	-	-
21.	Mandori Traders Pvt. Ltd.	Shajapur	3.5.2020	6.5.2020	EM, BG & PDC deposited
		Hoshangabad	1.5.2020	-	EM & PDC deposited. BG not deposited
22.	Swami Multi Marketing Pvt. Ltd.	Shajapur	3.5.2020	6.5.2020	EM, BG & PDC deposited
		Dhar	1.5.2020	6.5.2020	EM & BG deposited. PDC not deposited
		Alirajpur	2.5.2020	6.5.2020	EM deposited. BG & PDC not deposited
23.	Moonrise Retail Trading Pvt. Ltd.	Shivpuri	2.5.2020	7.5.2020	-do-
24.	Ms/ Wine World	Devas	2.5.2020	7.5.2020	-do-
25.	Indore Liquors Gallery	Indore	1.4.2020	-	-do-
26.	Aldas India Pvt. Ltd.	Tikamgarh	1.5.2020	6.5.2020	-do-
27.	Sunil Sahu	Neemuch	3.5.2020	6.5.2020	-do-
28.	M/s P.N. Group	Guna	7.4.2020	6.5.2020	EM, BG & PDC deposited
		Vidisha	2.5.2020	6.5.2020	-do-
		Ashoknagar	1.5.2020	6.5.2020	-do-
29.	Sangeeta Chauhan	Guna	7.4.2020	6.5.2020	-do-
30.	Shri Dharamveer Rathore	Rajgarh	7.4.2020	6.5.2020	EM deposited, BG & PDC not deposited

*__EM__ = Earnest Money, **BG** = Bank Guarantee, **PDC** = Post-dated cheques

In the backdrop of the contention that the petitioners have already started operating the liquor shops granted to them, the respondents have denied that any of the relief prayed for in the writ petition can be granted to them.

13. It is further averred in the return that due to outbreak of contagion various economic activities in the country have been disrupted and the State of Madhya Pradesh is also not aloof from the same. Apart from tackling Covid-19 outbreak, the State Government is putting various measures in place to provide financial support to the economy on all fronts. Considering the hardships and difficulties being faced by the liquor licence holders/petitioners due to Covid-19 pandemic and subsequent lockdown, the State vide order dated 31.03.2020 (Annexure R-4) has decided to waive off the licence fee for the period in financial year 2019-20 and 2020-21 during which they were unable to run their shops due to lockdown. The contractors will get waiver for the minimum guarantee amount after adjusting four dry days, which are available at the discretion of the Collector (to the extent available) for the lockdown period in financial years 2019-20 and 2020-21. The contractors who have pending annual licence fee or any other government dues for the financial year 2019-20 can extend their bank guarantees until 30th June, 2020 and can pay the amount due by 30th April, 2020. Liberty has been given to the district level committee to give a further extension in the payment date up to 31st May, 2020 on the request of the Collector. The contractors have been permitted to deposit 20% of the total prescribed bank guarantee within seven days of issue of license, another 20% within 15 days of issue of licence and the remaining 60% within 45 days of issue of licence. As many liquor shops were required to be closed due to lockdown restrictions despite issue of licences, a further relaxation in the conditions has been provided by counting the start of the period 7/15/45 days from the date the shop was legally permitted to be opened rather than from the date of issue of licence. For the year 2020-21, for renewal of the FL-2/FL-3/FL-4 and similar licences, which were in operation in 2019-20, it has been decided to allow submission of such proposals on deposit of only 50% of the prescribed licence fees. The remaining 50% of licence fees can be deposited within 30 days of issue of licence to them. The order dated 31.03.2020 (Annexure R-4) was issued by the Department of Commercial Tax, State of M.P. to the Commissioner Excise, M.P., Gwalior, who in turn has communicated such instructions to all the Collectors in the State vide separate order of even date. The relevant

extract of the order dated 31.03.2020 (Annexure R-4) issued by the State, is reproduced as under:-

''मध्यप्रदेश शासन
वाणिज्यिक कर विभाग
मंत्रालय वल्लभ भवन भोपाल

क्रः एफ बी–01–06/2020/2/पांच, भोपाल दिनांक 31 मार्च 2020

प्रति

आबकारी आयुक्त
मध्यप्रदेश ग्वालियर

विषय– प्रदेश में नोबल कोरोना वायरस (COVID-19) की रोकथाम के लिये घोषित 21 दिवस लॉक–डाउन अवधि के कारण वित्तीय वर्ष 2019–20 की समाप्ति एवं नये वित्तीय वर्ष के आरम्भ पर निष्पादित फुटकर मदिरा विक्रय की दुकानों, अनुज्ञप्तियों/प्रक्रियाओं आदि के लिये निर्देशित व्यवस्थाओं के संबंध में।

संदर्भः– आपकी टीप क्रमांक Q/2020 दिनांक 30 मार्च 2020

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कृपया उपर्युक्त विषयांकित संदर्भित टीप का अवलोकन करें।

2/ राष्ट्रीय विपदा कोरोना वायरस के फेलाव पर नियंत्रण तथा बचाव के प्रयासों के तहत् दिनांक 25.03.2020 से 21 दिवस तक संपूर्ण देश में लॉकडाउन घोषित किया गया है । वर्तमान में (COVID-19) की वैश्विक महामारी के कारण आबकारी विभाग के कार्य संचालन में अनेक व्यावहारिक/सैद्धांतिक कठिनाईयां उत्पन्न हुई हैं। वर्ष 2019–20 के दौरान मार्च 2020 में विभिन्न जिलों में स्थाानीय स्तर पर कानून व्यवस्था तथा अन्य आधारों पर शुष्क दिवसों की घोषणा की गई है अथवा दुकानों का संचालन प्रतिबंधित किया गया है। दिनांक 28 मार्च से मध्यप्रदेश शासन द्वारा भी लॉकडाउन अवधि में मदिरा दुकानों का संचालन प्रतिबंधित कर दिया गया है। इस कारण उत्पन्न परिस्थितयो से वर्ष 2019–20 के कतिपय अनुज्ञप्तिधारियों को वर्ष 2019–20 के अंतिम पक्ष की लायसेंस फीस जमा करने में व्यावहारिक परेशानी आ रही है। इस संबंध में अनुज्ञप्तिधारियों द्वारा विभिन्न जिला कलेक्टरों से इस प्रकार की मांग की गई है कि उन्हें वर्तमान में प्रचलित प्रावधानों को शिथिल कर वार्षिक लायसेंस फीस जमा किये जाने हेतु आनुपातिक छूट प्रदान की जाय। उपरोक्त समस्याओं को दृष्टिगत रखते हुए वर्ष 2019–20 के मदिरा दुकानों के संबंध में अनुज्ञप्तिधारियों को निम्नानुसार राहत प्रदान की जाती हैः–

(i) वर्ष 2019–20 में कलेक्टर द्वारा वर्ष 04 दिवस शुष्क दिवस घोषित किये जाने वाले दिवस यदि शेष हो तो उसे पहले समायोजित करते हुए शेष वर्ष 2019–20 के अनुज्ञप्तिधारियों को दिनांक 28 मार्च 2020 से दिनांक 31.03. 2020 तक की अवधि की न्यूनतम प्रत्याभूति की राशि की आनुपातिक छूट प्रदान की जाकर शेष न्यूनतम प्रत्याभूति की राशि की वसूली यथा समय सुनिश्चित की जाये । इसके अतिरिक्त अवधि में निर्धारित शुष्क दिवसों के अतिरिक्त बंद रही दुकानों हेतु क्षतिपूर्ति के प्रकरण आवेदकों द्वारा प्रस्तुत किये जाने पर जिला समिति द्वारा सम्यक परीक्षण कर यथोचित कार्यवाही की जाए।

(ii) वर्ष 2020–21 में दिनांक 01 अप्रैल से निरंतर जितने दिन तक मदिरा दुकानों का संचालन प्रतिबंधित रहेगा उक्त अवधि में से जिला कलेक्टर के विवेकाधीन 04 शुष्क दिवसों को समायोजित कर शेष अवधि के दिवस की वार्षिक मूल्य में आनुपातिक छूट प्रदान की जायेगी।

3/ दिनांक 31 मार्च 2020 को मदिरा दुकानों पर अवशेष स्कंध का सामान्य अनुज्ञप्ति की शर्त क्रमांक 25 के अनुरूप विधिवत पंचनामा बनाया जाकर निम्नानुसार कार्यवाही की जाएः–

(A) जिन मदिरा दुकानों का वर्ष 2020–21 हेतु निष्पादन नवीनीकरण के माध्यम से संपन्न हो चुका है, वहॉ उक्त मदिरा स्कंध नवीनीकृत अनुज्ञप्तिधारी को सुरक्षित रखने हेतु सुपुर्दगी में दिया जाये।

(B) जिन मदिरा दुकानों का वर्ष 2020–21 हेतु निष्पादन नवीनीकरण से भिन्न माध्यम से संपन्न हुआ है अथवा जो निष्पादन से शेष है, वहॉ उक्त मदिरा स्कंध वर्ष 2019–20 के अनुज्ञप्तिधारी को सुरक्षित रखने हेतु सुपुर्दगी में दिया जाये ।

दोनो ही स्थितियों में वर्ष 2020–21 हेतु मदिरा दुकानों का संचालन प्रारंभ होने पर उक्त स्कंध का निराकरण सामान्य अनुज्ञप्ति शर्तों की शर्त क्रमांक 25 के अनुरूप किया जाये ।

4/ वर्ष 2019–20 के अनुज्ञप्तिधारियों में से जिनकी वार्षिक लायसेंस फीस दिनांक 31 मार्च 2020 की स्थिति में अवशेष है अथवा उन पर अन्य कोई शासकीय राशि की देयता शेष है उनकी वर्तमान बैंक गारंटियों की वैधता अवधि में दिनांक 30 जून तक की वृद्धि करवाई जाये । यदि अनुज्ञप्तिधारी 30 अप्रैल 2020 तक अवशेष राशि जमा कराने में असमर्थ रहता है, तो उक्त स्थिति में उसके अनुरोध पर जिला समिति अपने विवेकानुसार उक्त बैंक गारंटी की विस्तारित अवधि की सीमा के भीतर शेष राशि जमा करने हेतु 31 मई तक समय सीमा में वृद्धि कर सकेगी। इस समयावधि के उपरांत जिला आबकारी बैंक गारंटी से राशि वसूली की जा सकेगी। यदि ऐसा अनुज्ञप्तिधारी 30 जून तक बैंक गारंटी की उपरोक्त वृद्धि बैंक से करवा कर स्वीकृत नहीं करता है तो 30 अप्रैल के पूर्व बैंक गारंटी से बकाया राशि वसूल कर ली जावे ।

5/ वर्ष 2020–21 के अनुज्ञप्तिधारियों द्वारा मदिरा दुकानों का संचालन लॉकडाउन की घोषित अवधि उपरांत ही किया जा सकेगा। वर्ष 2020–21 हेतु नवीन लायसेंस जारी करने के लिए आनुपातिक आकलित वार्षिक मूल्य के अनुसार आवश्यक प्रतिभूति राशि के 20 प्रतिशत की बैंक गारंटी/सावधि जमा या नगद राशि लायसेंस जारी करने के दिनांक (प्रस्तावित 14.4.2020 यदि 15.04.2020 को दुकाने खुलें) से आगामी 07 दिवस (20.04.2020 तक) में, अगली 20 प्रतिशत की बैंक गारंटी/सावधि जमा या नगद राशि लायसेंस जारी करने की दिनांक से आगामी 15 दिवस (28.04.2020 तक) एवं शेष 60 प्रतिशत की बैंक गारंटी/सावधि जमा या नगद राशि लायसेंस जारी करने की दिनांक से आगामी 45 दिवस (28.05.2020 तक) की अवधि में अनिवार्यतः जमा कराई जाये। निर्धारित संपूर्ण प्रतिभूति राशि लायसेंस जारी करने के दिनांक से 45 दिवस के अंतर्गत अनिवार्यतः प्राप्त की जाये ।

6/ वर्ष 2019–20 में संचालित विभिन्न एफ.एल–2/एफ.एल–3/एफ.एल–4 एवं समान प्रकृति के अन्य लायसेंसियों में से जिनके द्वारा अभी तक वर्ष 2020–21 हेतु निर्धारित लायसेंस फीस जमा कर नवीनीकरण के प्रस्ताव प्रस्तुत नहीं किये गये हैं, वे वर्ष 2020–21 हेतु निर्धारित लायसेंस फीस की 50 प्रतिशत की राशि जमा कर नवीनीकरण के प्रस्ताव प्रस्तुत कर सकेंगे एवं शेष 50 प्रतिशत लायसेंस फीस जमा करने हेतु उन्हें लायसेंस जारी करने के दिनांक से 30 दिवस का समय प्रदान किया जाये ।

कृपया उपरोक्तानुसार कार्यवाही की जाना सुनिश्चित करें ।

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार
सही/–
(एस.डी. रिछारिया)
उप सचिव
मध्यप्रदेश शासन
वाणिज्यिक कर विभाग
भोपाल दिनांक 31 मार्च 2020''

14. Still further, it is submitted in the return that in the financial year 2019-20, revenue of Rs.10,786 Crore was generated from the sale of liquor in the State and in the year 2020-21, revenue of Rs.12,000 Crore was expected. It is estimated that the Government would forego a revenue of around Rs.1,200 Crore in the month of April, 2020 on account of this waiver and in addition, there will be a loss of substantial amount of revenue in the month of May,

2020 but still the State Government is ready to accommodate the licence holders so as to meet the exigencies arisen out of the outbreak of pandemic. The operation of liquor shops with restrictions on shop bars/*Ahatas* would not affect the sale in any manner inasmuch as such total 149 shop bar licences were granted in the year 2017-18 but despite withdrawing the said facility in the year 2018-19, the annual value of the liquor shops in the entire State witnessed rise at an average of 20% in the year 2018-19 whereas overall rise at an average of 14.7% was recorded in the State in the latter. This submission has been tried to be substantiated by filing a comparative chart (Annexure R-5). The contention that due to spread of the disease and extended lockdown the financial capacity of the people to buy liquor would be severely affected and the contract has become impossible to perform, has been termed as mere apprehension of the petitioners looking to the trends of sale of liquor received on the first day of opening of the liquor shops after lockdown. If the petitioners violate any terms of the licence or the Excise policy 2020-21, the respondents reserve their right to cancel the licence, forfeit the bank guarantee and deposits and re-auction the liquor shops.

15. The petitioners have filed preliminary rejoinder on 18.05.2020 to the reply filed by the respondents-State *inter alia* controverting that the licences which were issued to the petitioners cannot be culminated into a valid contract, therefore, in view of Section 56 of the Indian Contract Act, 1872 (hereinafter referred to as "the Contract Act"), the entire proceedings stand frustrated. The assurances which were promised in the Excise policy do not exist in the present scenario as there is an admission in the return that there are various restrictions on opening of the shops including that they have bifurcated the shops in districts which are within the red zones and permitted to open the shops in particular area whereas the auction was not conducted for individual shops. An averment has been made that the decision to open the liquor shops has been taken by giving a counteroffer that the licences shall be granted under the new conditions which are contrary to the one prescribed in the excise policy and which were available at the time of submission of the bid. The petitioners have declined to accept the licences under new conditions but even though the pre-conditions for issue of licences such as furnishing

bank guarantee and post-dated cheques etc. have not been completed by the petitioners yet the respondents are issuing the licences and threatening to operate the shops and submit the mandatory documents else their bids would be cancelled and the shops shall be put to re-auction and difference amount would be recovered from the petitioners. On the representations of the successful bidders, the Excise Commissioner vide order dated 9.5.2020 (Annexure RJ-6) has constituted a committee of the officers of the Excise Department to resolve the difficulties being faced by liquor contractors and to submit a report before 14.05.2020. The petitioners also personally met the Authorities to consider their demands and difficulties. According to the petitioners, the Committee has recommended for giving waiver of 25% of the licence fee and further waiver of the same for the period the shops remained closed. The petition has not rendered infructuous because shops are being opened on the assurances given by the State coupled with the threat of cancelling the bid and recovering the balance amount. The revenue generated from the shops which have been allowed to open in four districts under relaxation in just initial six days cannot be the criteria to assess the sale for rest of the year. It is asserted in the rejoinder that vide Office Memorandum dated 19.02.2020 and 13.05.2020 (Annexure RJ-1), the Government of India, Ministry of Finance has clarified that disruption of the supply chains due to spread of Corona virus in China or any other country should be considered as a case of natural calamity and Force Majeure clause may be invoked wherever considered appropriate, following the due procedure laid down therein.

16. The petitioners also filed an application (**I.A. No.4071/2020**) on 26.05.2020, seeking amendment in the writ petition to challenge the Notification dated 23rd May, 2020 issued by the State published in the Gazette of M.P. (Extraordinary) whereby the State has amended the earlier Excise policy dated 25.02.2020 under which the offers were invited. The revised Clause 16.7 threatening to disqualify any contractor for future tender or renewal in case of non-acceptance of amended conditions and further clauses 12, 70, 70.6 making counteroffers purporting to be novation of contractual terms, have been inserted merely to force the petitioners to succumb to the

wishes of the respondents. It is alleged that the respondents have added new clauses which are in terrorem and arbitrary and therefore, cannot be enforced against the petitioners. The relevant offending conditions in the amended Excise Policy dated 23rd May, 2020 and the affidavit appended thereto, read as under:-

''वाणिज्यिक कर विभाग

मंत्रालय, वल्लभ भवन, भोपाल

कार्यालय आबकारी आयुक्त, मध्यप्रदेश, मोतीमहल, ग्वालियर

ग्वालियर, दिनांक 23 मई 2020

क्र.–सात–ठेका–2020–21–789–ग्वालियरः सर्वसाधारण की जानकारी एवं आबकारी के फुटकर ठेकेदारों की विशेष जानकारी के लिये राज्य शासन के आदेशानुसार यह सूचना प्रकाशित की जाती है कि वर्ष 2020–21 के लिये, अर्थात् दिनांक 01 अप्रैल 2020 से दिनांक 31 मार्च 2021 तक की अवधि के लिये, राज्य की देशी/विदेशी मदिरा की फुटकर बिक्री की दुकानों के समूह/एकल समूहों के निष्पादन बाबत मध्यप्रदेश राजपत्र (असाधारण) क्रमांक 77 दिनांक 25.02.2020 में प्रकाशित व्यवस्था में निम्नानुसार संशोधन किये जाते हैं ।

संशोधन

1. कंडिका 16.6 के पश्चात नवीन कंडिका 16.7 निम्नानुसार स्थापित की जाती है :–

''16.7 वर्ष 2020–21 का ऐसा अनुज्ञप्तिधारी, जिसकी निजी स्वामित्व की अथवा फर्म के भागीदार/कम्पनी के संचालक/शेयर होल्डर के रूप में आंशिक स्वामित्व की एक भी मदिरा दुकान/समूह/एकल समूह की अनुज्ञप्ति के निरस्तीकरण अथवा पुनर्निष्पादन के आदेश राज्य के किसी भी जिले में किये गये हों, वह मध्यप्रदेश राज्य के किसी भी जिले में संचालित मदिरा दुकान/समूह/एकल समूह के लिये नवीनीकरण/लॉटरी/ई–टेण्डर अथवा किसी भी अन्य रीति से वर्ष 2020–21 की आबकारी नीति (मूल एवं संशोधित) के अंतर्गत निष्पादन/पुनर्निष्पादन की कार्यवाही में भाग लेने के लिये अपात्र होगा।''

2. कंडिका 25.1 में अंकित ''15 प्रतिशत'' को ''25 प्रतिशत'' से प्रतिस्थापित किया जाता है।

3. कंडिका 25.2 में अंकित ''10 प्रतिशत'' को ''20 प्रतिशत'' से प्रतिस्थापित किया जाता है।

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''6. कंडिका क्रमांक 69 के पश्चात् निम्नांकित कंडिका स्थापित की जाती है :–

''70 वर्ष 2020–21 के अनुज्ञप्तिधारियों को उनकी ठेका अवधि दिनांक 31.05.2021 तक बढ़ायी जाने का विकल्पः–

कोविड–19 के कारण उद्भूत परिस्थितियों को दृष्टिगत रखते हुये वर्ष 2020–21 के अनुज्ञप्तिधारियों को उनकी ठेका अवधि दिनांक 31.05.2021 तक बढ़ाये जाने का विकल्प दिया जाता है । यदि इस विकल्प के चयन हेतु कोई अनुज्ञप्तिधारी, आबकारी आयुक्त द्वारा निर्धारित प्रारूप में अपना सहमति आवेदन, वांछित दस्तावेजों के साथ संबंधित जिला कलेक्टर को प्रस्तुत करता है, तो ठेका संचालन की अवधि दिनांक 31.05.2021 तक जिला कलेक्टर द्वारा बढ़ायी जा सकेगी। जो अनुज्ञप्तिधारी इस विकल्प का

लाभ न लेना चाहे, वे मूल आबकारी नीति वर्ष 2020–21 के अनुसार ठेका संचालित करते रहेंगे। जिन अनुज्ञप्तिधारियों के आवेदन स्वीकार किये जाते है, मात्र उनके लिए इस कंडिका की निम्नलिखित उप कंडिकाऐं लागू होंगी।''

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70.6 इस अधिसूचना के राजपत्र में जारी होने के दिनांक से 05 दिवस की अवधि (अथवा ऐसी अवधि जैसा राज्य शासन नियत करे) में वर्तमान अनुज्ञप्तिधारियों को उपरोक्त विकल्प, यदि वे उचित समझे, चुनना आवश्यक होगा, अन्यथा यह माना जायेगा की वे पूर्व अनुबंध पर कायम हैं तथा वर्ष 2020–21 के लिये प्रावधानित आबकारी व्यवस्था (राजपत्र दिनांक 25.02. 2020) के अनुरूप मदिरा दुकानों का संचालन करना उनके लिये बंधनकारी होगा ।'''

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प्रारूप कमांकः............

'कोविड–19 के कारण प्रदेश में उत्पन्न परिस्थितियों के परिप्रेक्ष्य में वर्ष 2020–21 के अनुज्ञप्तिधारियों को नवीन विकल्प चयन किये जाने की स्थिति में सहमति बावत प्रस्तुत शपथ पत्र

शपथ पत्र''

*** *** ***

'(1) ....

'(12) यह विषय मेरे संज्ञान में है कि वर्ष 2020–21 व बढ़ी हुई अवधि (31.5.2021) के लिये स्वीकृत आबकारी व्यवस्था में लायसेंस अवधि के दौरान राज्य शासन यथा आवश्यक परिवर्तन कर सकेगा तथा वह मुझे मान्य होगा।''

17. The petitioners also filed an application (**IA No.4072/2020**) on 26.05.2020 to bring on record subsequent events wherein copies of show cause notice (Annexure A-2), certain correspondences as contained in Annexure A-3, made by the Chief Secretary, Commercial Tax Department, Annexure A-4 to A-6 and Annexure A-17 i.e. the correspondence made between the Office of the Commissioner, Excise, M.P. and the petitioners, report of the Committee dated 14.05.2020 (Annexure A-7) and letters sent by the petitioners (Annexure A-10) have been annexed to show and reiterate that only under coercion and threat from the State Authorities to take penal action followed by the assurances to settle the matter through meetings and discussions at the highest level, the petitioners had conditionally opened some of their shops under protest pending resolution of the issues with the State Government. All the suggestions made by the delegation of the liquor contractors were categorically rejected. The petitioners have also filed a letter dated 23.05.2020 (Annexure A-16) issued by the Excise Department of Uttar Pradesh admitting that the sales are down by more than 40% as compared to

the previous year. The new revised policy dated 23.05.2020 is being challenged by way of fresh writ petition to avoid any technical objection being raised.

18. During the course of hearing on 27.05.2020, the respondents sought time for putting on record the various terms of the Excise policy as well as the agreement entered into with the licensees at the time of auction. Accordingly, they submitted an additional affidavit vide **IA No.4700/2020** on 02.06.2020. According to the respondents, out of 380 successful bidders in the State, 333 have accepted to perform the contract on the same terms and conditions. Only 47 successful bidders have approached this Court on the ground of apprehension of loss and impossibility to perform the contract. They have invited attention of this Court to clause 9.4, 9.6, 48 and 49 of the original Excise policy 2020-21 wherein consequences of non-performance of the contract are clearly provided. According to them, Clause 10 of the Foreign Liquor licence and Clause 15 of the Country Spirit licence oblige the licensee with the compliance of general licence conditions. A copy of sample licence for country made liquor and foreign made liquor have been filed as Annexure R-9. It was also submitted that vide order dated 28.05.2020 (Annexure R-10), the State Government has also allowed opening of liquor shops in red zones. Along with the additional affidavit, the respondents have filed a chart (Annexure R-11) showing the date of issue of licence, starting date of sale and amount of duty deposited by the petitioners after opening of the shops on 05.05.2020, which according to them, demonstrates that people are thronging in huge numbers to liquor shops and mere reduction in two hours would not affect the sale. Under clause 2 of the Excise policy, the bar shop facility is given only on additional licence fee. If such facility is not available due to restrictions post Covid-19, the petitioners need not pay such additional licence fee. Even otherwise, the restrictions are temporary. Once they are lifted, the entire 14 hours period per day would be available to the petitioners. The respondents have placed on record a sample affidavit (Annexure R-16) wherein, in clause 13, the successful bidders have specifically accepted that the State Government could make amendment in the Excise Policy 2020-21 during the licence period, which would be acceptable to the bidder.

19. Sur-rejoinder has been filed by the respondents on 01.06.2020 vide **I.A. No.4658/2020** to controvert the submissions made by the petitioners in their rejoinder dated 18.05.2020. It is denied that Office Memorandum dated 19th February, 2020 has any application to the facts of the present case. It applies to the Central Government Ministries and Departments and not to the State Governments. Even otherwise, it provides for extension of time rather than permitting avoidance of contract. It is stated that in the scenario which has happened due to Covid-19, the email has become preferred mode of communication, therefore, the licences were issued through email. The security amount in the form of bank guarantee and post-dated cheques were pre-requisite of issuing the licences but since the normal banking working was affected due to lockdown which delayed issuance of bank guarantee and cheque books, therefore, the licensees were given a grace period for depositing the bank guarantees/post-dated cheques. Thus, nothing has been thrust upon the petitioners but the respondents have adopted a considerable approach to meet the challenges faced by the licensees. The liquor shops were permitted to open in terms of relaxation issued by the Central Government vide Advisory issued by MHA dated 17.05.2020 (Annexure R-1), which was issued in pursuance to earlier Advisory dated 01.05.2020 (Annexure R-3). The Committee so constituted vide order dated 09.05.2020 was dissolved on 20.05.2020 as a committee of Ministers was constituted to resolve the issues regarding the contracts that were executed or are to be executed (vide order dated 13.05.2020 Annexure R-2). The Excise Commissioner's letter dated 09.05.2020 was also withdrawn vide letter No.26 dated 09.05.2020. There being a valid and binding contract, the petitioners cannot be permitted to wriggle out of the same.

20. An application, **IA No.4141/2020** has been filed on behalf of the petitioners seeking interim protection and initiating the contempt proceedings against the respondents alleging that during the course of hearing on 27.05.2020, an assurance was made on behalf of the State that no coercive steps shall be taken but the officers of the respondent-Excise Department have breached the said statement and assurance by issuing an order/charge-sheet dated 29.05.2020 (Annexure A-1 to the said application) imposing penalty on

the petitioner No.18 for closing the shops. Similarly, letters Annexure A-2 have been issued to the petitioner No.23 pressurising him to open his shops otherwise strict action shall be taken against him. Similar action by issuing charge-sheets and threatening orders alleged to be taken vide documents Annexure A-3 to A-12 was taken against certain other petitioners directing them to complete the remaining formalities of auction process otherwise penal action shall be taken.

21. The respondent-State vide **IA No.5158/2020** has filed reply to the said application and denied that any coercive steps were taken against the petitioners. It has been further submitted that the letters/notices filed by the petitioners with the application are in respect of completion of allotment letter conditions, violation of general licence conditions as some of the petitioners had kept their liquor shops closed and for completing the remaining formalities and that no penalty has been imposed by the respondents. There is nothing to show that allotment of any liquor shops or licence was cancelled. Neither any amount deposited by the petitioners was forfeited nor has any recovery been directed against any of the petitioners. The said notices were issued to the concerned petitioners as a consequence of violation of Excise policy, licence conditions and terms of allotment by them and would not amount to issuing any threat or pressure. They have filed a letter dated 30.05.2020 (Annexure R-1) stating that the letter dated 29.5.2020 (Annexure A-11 to IA No.4141/2020) was inadvertently written by the District Excise Officer to the Bank for payment of post-dated cheque and for this lapse, the said officer was transferred vide order dated 3.6.2020 (Annexure R-2). It is also a fact that the said cheque bounced for insufficient funds.

22. The respondents-State by filing an application **IA No.4142/2020** have adopted the pleadings filed in WP No.7373/2020 for the purposes of responding in all the connected writ petitions.

23. **IA No.4737/2020** dated 03.06.2020 i.e. the Reply to the additional affidavit submitted by the respondents-State has been filed by the petitioners to clarify the facts submitted by the respondents. It is averred that to say the least, the correct factual position has not been stated by the respondents. It is

stated that merely 12.17% of the petitioners in terms of revenue have accepted the revised policy due to various reasons. The liquor contractors/groups who have not accepted the changed terms and conditions comprise nearly 75% of the revenue of the State through liquor contracts. Four metros, namely, Indore, Bhopal, Jabalpur and Gwalior itself constitute more than 40% of the revenue through liquor sale and they have not agreed to the changed terms and have kept their shops closed after the time limit for accepting the terms of the amended policy expired. In two major metros namely, Indore and Bhopal the shops were never opened till-date (03.06.2020). The document Annexure R-11 filed by the respondents itself shows that the duty being collected/goods being lifted are only at 33.85% of the licence value in view of the extreme dip in sales. The document Annexure R-15 relied upon by the respondents is a misleading document since it does not reflect the revenue share of the licensees who have accepted the option. In fact, Jabalpur city comprises of 144 shops with revenue of over Rs.600 Crore but in Annexure R-15 the respondents have shown Jabalpur as only two groups. Still further, prior to auction/renewal, the number of groups were 1147 in number out of which 232 groups have accepted the revised policy amounting to 20.05% of the groups. The petitioners have filed chart Annexure A-1 with the reply to suggest that across the State, the total revenue impact of non-acceptance of new terms and closing of shops is 73.43% whereas only 26.57% have opted for the changed conditions. As far as the petitioners in W.P. No.7373/2020 are concerned, it is stated that these 30 petitioners comprise of the State revenue of Rs.4,392.66 Crore and out of them, only 4-5 shops/groups have accepted the terms and opened the shops. They comprise of only 12.17% of revenue, which means that contractors with 88% of revenue involved in the petition have not accepted the amended policy after 28.05.2020.

24. During the course of hearing on 04.06.2020, learned senior counsel for the petitioners sought time that few petitioners were ready and willing to continue with the licences and operate their shops including the cases of renewal of liquor licence. Therefore, liberty was granted that the petitioners those who are willing to continue with their shops, shall file an affidavit within three working days, failing which the State shall be entitled to auction

the shops afresh on terms as may be laid down in that behalf. However, to balance the equity between the parties and also to prevent loss of revenue to the State, it was directed that the State shall not take any coercive means against the petitioners during the pendency of the writ petitions till the next date of hearing as the issue relating to the recoveries due to re-auction shall be examined in the petitions. Pursuant to the said order, the respondents have filed an additional affidavit being **IA No.5151/2020** bringing on record that the State Government has cancelled the contract and decided to re-auction the liquor shops of those petitioners/other parties, who have either filed an affidavit expressing unwillingness to continue with the contract or have not filed an affidavit within the stipulated time. It was also apprised that out of total 140 petitioners who have approached this Court, as many as 90 petitioners have submitted their affidavits expressing willingness to continue with the contract while the remaining 50 petitioners have either filed an affidavit expressing their unwillingness to continue with the contract or have not filed any undertaking, which inevitably means that they are also not willing to continue with the contract. Thus, out of total 290 liquor groups for which the auction was conducted, 150 successful bidders have either not come before this Court or have filed affidavits expressing their willingness to continue with the contract. In this manner, 240 liquor groups including as many as 90 petitioners herein who have submitted the affidavits showing their willingness, do not have any grievance with the continuance and performance of the contract.

25. In pursuance to interim order dated 04.06.2020, the petitioners have also filed an application (**IA No.4322/2020**) to bring on record subsequent events inter alia stating that in terms of chart annexed with the application at Annexure A/1, the licensees who have submitted affidavits to run the shops are merely 33% in terms of total revenue of the State whereas the licensees who have kept their shops shut constitute around 66% in terms of total revenue of the State. It is further highlighted that though the number of liquor groups who have opted to surrender and not accepted the changed conditions may be around 50 but they carry a revenue implication of 63% of the entire State inasmuch as from a total yearly revenue of Rs.1,06,16,46,45,186/- the

shops having been surrendered, amounts to Rs.66,91,40,76,598/- as shown in the chart Annexure A-1. After the unwilling licensees have surrendered their licences, the State Government started operating the liquor shops in terms of order dated 06.06.2020 (Annexure A-2) but thereafter, faced with some difficulty to run the shops, the State Government floated an order dated 09.06.2020 (Annexure A-3) thereby making an interim arrangement that till all the shops of which the allotment was cancelled, are re-auctioned, the shops shall be auctioned for a period of seven days, which could be further extended only four times for seven days each. According to the petitioners, the reserve price for auction has been decided as the value of one day of the annual value of the current year and the order dated 09.06.2020 clearly mentions that the provisions of the main Excise policy shall be binding on the bidders. It is stated that in pursuance to the aforesaid order dated 09.06.2020, the State Government invited bids for various groups but could receive the bids for not more than 20% of the shops and even the bids which were submitted by the bidders were quite less than the reserve price. Due to which, the State vide letter dated 12.06.2020 (Annexure A-4) relaxed the mandatory condition of base price/reserve price and thereafter, on same date, vide letter Annexure A-5 directed all the Collectors to keep the bids on standby which were less than the reserve price with a direction to invite fresh bids on the next date and thereafter to allot the tender to the bid, which is higher. Still unable to attract the bidders for all the groups of all the districts, the State Government vide order dated 13.06.2020 (Annexure A-6) has indirectly revalued the tender price which is the main relief of the petitioners and relaxed the condition that no bid shall be accepted which is lesser than the reserve price and directed the Collectors to accept the bids upto 80% of the amount of the reserve price. In this way, the State has accepted that 20% of the total amount has to be reduced from the annual value if the shops are to run smoothly and thus, since the State Government has itself reduced the annual licence value of the year 2020-21 in the re-tender but still not getting the offers, the stand taken by the petitioners that it is extremely difficult to smoothly run the liquor shops if the tender price is not revalued, stands vindicated. It has also been that in pursuance to interim order dated 04.06.2020, one of the petitioner in W.P.

No.7472/2020, namely, M/s Tika Ram Kori & Co. had participated in one of the tender in District Ujjain through a Firm in which he was also a Partner, but, the said bid was not even considered as the Authorities were of the view that the Firm and all its partners have been blacklisted as their allotment has been cancelled by the State Government. In the background of these subsequent events, the petitioners vide application **I.A. No.4323/2020** seeking interim relief, prayed that the petitioners may not be treated as defaulters and blacklisted and they may be permitted to participate in the fresh bidding process and the earnest money deposited by the petitioners at the time of earlier tender be directed to be returned/adjusted.

26. Having noticed the pleadings, we now proceed to examine the submissions made on behalf of the learned counsel for the parties.

27. Mr. Mukul Rohatgi, learned senior counsel led the arguments on behalf of the petitioners and broadly raised the following arguments under different heads, which are categorized as under:-

(A) ***The contract is not concluded. Hence, it cannot be enforced upon the petitioners:***

i. Admittedly, no licence was issued upto 01.04.2020 i.e. the date from which the petitioners had to operate the liquor shops as per the Excise policy 2020-21 in pursuance to acceptance of their offers/bids. Thus, the tender process itself had not concluded owing to lockdown imposed by the Government which remained operative from 25.03.2020 to 03.05.2020 and the originally envisaged contract with the Government stood frustrated in view of the Covid-19 Pandemic. There was no concluded contract entered between the parties. Therefore, the same cannot be enforced upon the petitioners.

ii. Article 299 of the Constitution of India requires a contract with the party to be entered in the name of the Governor. Though vehemently denied but even if this Court ultimately comes to the conclusion that there has been a contract between the parties, the

same is void and is not enforceable either against the State or the party as the contract is not in the name of the Governor. Reliance was placed upon the judgment of the Supreme Court in **State of Punjab and others vs. Om Prakash Baldev Krishan, (1988) Supp SCC 722**.

(B) ***Mandatory conditions of the Excise Policy and Excise Act were not completed before issuing the licence. Therefore, the licence is not valid and there is no concluded contract:***

iii. Section 17 of the Excise Act clearly mandates and makes a bar that there shall be no sale of intoxicant without the licence. As per the Excise Policy 2020-21, the licence period is to commence from 01.04.2020 to 31.03.2021. Thus, the licence to operate the liquor vends was to be issued on or before 01.04.2020 but admittedly it had not been issued due to lockdown imposed w.e.f. 25.03.2020. Similarly, there were certain other mandatory requirements of the Excise Policy 2020-21 i.e. security deposit in the form of bank guarantee in terms of Clause 10 and post-dated cheques towards additional security deposit ($1/12^{th}$ of the value of 95% in terms of Clause 20 of the policy) were also to be deposited by the successful bidders before 31.03.2020. Deposit of security is the pre-requisite for grant of licence. After acceptance of offer, the counterpart agreement was also to be executed in terms of Clause 21 of the policy. An affidavit as per clause 18.3, which was uploaded at the time of the bid by the bidders, was to be submitted in original. All these conditions could not be fulfilled owing to lockdown declared on 24.03.2020. The documentation and the payment taken together as such shall alone constitute entitlement for licence but the respondents themselves were not in a position to complete these mandatory requirements for issue of a licence within the timeline stipulated under the Excise policy. This, in itself, shows that there was no concluded or valid contract between the parties,

therefore, question of wriggling out of the same does not arise. It was argued with vehemence that if a statutory contract requires the contract to be made in a particular manner then it has to be made in that manner only and not in any other manner. To bolster this submission, learned counsel relied upon the judgment of the Privy Council in **Nazir Ahmad vs. King Emperor (AIR 1936 PC 253)**.

iv. The copies of the licences were unilaterally sent by email on 2nd May, 2020 without fulfilling and completing the mandatory pre-conditions of issue of licences and without relaxing necessary conditions in the policy. The grant of licences through email is a desperate act on behalf of the State. The Statute provides that the licence has to be issued physically and it has to be displayed on the shop. Thus, since the licence has been issued contrary to the Statute, therefore, the issue of licence is unlawful.

v. Under Section 28 of the Excise Act, the respondents are obliged to issue licence on a particular form and conditions only, as may be prescribed by the Excise policy. Thus, the respondents do not have any power to change the conditions, restrictions, period provided under the Excise Policy 2020-21.

vi. The licences so issued to the petitioners are not the valid licences as the same have been issued in arbitrary manner without complying with the provisions of Section 29 of the Excise Act, which envisages that the licensee is required to execute a counterpart agreement in conformity with the tenure of his licence and to give security for the performance of the agreement or to make deposit or to provide both as the authority may think fit.

vii. As per the Excise policy, the licence period was to commence w.e.f. 1st April, 2020 whereas copies of the licences to run the liquor shops were issued much after 2nd May, 2020 and made operative with retrospective effect from 1st April, 2020. During

this period of more than a month, the petitioners were not allowed to operate the allotted liquor shops. Therefore, the licences could not have been issued with retrospective effect. Even otherwise, the Excise policy does not give any power for grant of retrospective licence for an effective term of less than 11 months instead of full 12 months term stipulated in the Excise policy.

(C) ***The Excise Policy 2020-21 and conditions of licence could not have been unilaterally amended midway through the contract and that too to the disadvantage of the petitioners. The Amended Policy deserves to be quashed:***

viii. Some shops were directed to be opened on trial basis. Accordingly, the shops were opened by some contractors under the coercion of penalty and assurances that new workable policy shall be issued by the State but without addressing the practical difficulties raised by the petitioners unilateral amendments have been incorporated in the policy. In view of the pandemic, the State Government ought to have first amended the Excise policy in April, 2020 before issuing the licences. Support was gathered from the pronouncement of the Supreme Court in **Delhi Development Authority vs. Joint Action Committee (2008) 2 SCC 672.**

ix. It was urged that some individual officers have also issued threats against the petitioners and shop owners through WhatsApp and by issuing notices to open the liquor shops and to opt for options introduced vide amended policy. This was done despite the assurance given at the bar on 27.05.2020 for not taking any coercive action against the licensees.

x. Clause 16.7 has been added in the fresh policy to coerce the petitioners as it undermines the option of the petitioners to move the court against the arbitrary actions and creates an atmosphere of fear. Vide newly inserted clause 70 in the policy, the State has

extended the period of contract upto 31.05.2021. The counter offer given by the respondents is not acceptable and rather the petitioners would seek exit with full refund of their deposits. No penalty can be fastened upon the petitioners.

xi. The State by issuing the amended Excise Policy on 23.05.2020 has given a counteroffer to the petitioners during the pendency of the writ petition and this fact also goes to show that the contract is not concluded and the new policy is a new bargain. Reference was made to the decision in **U.P. Rajkiya Nirman Ltd. vs. Indure Pvt. Ltd. and others, (1996) 2 SCC 667.**

xii. Clause 12 of the affidavit appended to the amended Excise policy dated 23.05.2020 is ex facie illegal and arbitrary as it automatically binds the petitioner to agree to any changes that the State Government makes during the terms of the licence between 01.04.2020 to 31.05.2021.

xiii. Requisite procedures envisaged under Sections 18, 28 and 29 of the Excise Act have not been complied with by the respondents and unilateral alterations have been made in the policy to the detriment of the petitioners, which cannot be enforced in law unless specifically accepted by the petitioners. In terms of Clause 70.6 of the amended policy notified on 23.05.2020, the existing licensees had been given only five days to accept or not to accept the newly added provisions and this shows that the respondents have acted *mala fide* against the petitioners.

xiv. All orders passed by the Excise Office/Collectors attempting to unilaterally change the old policy are *ultra vires* and *void ab initio*. The changes made to the policy are not comprehensive or practicable, thus, the contract is frustrated.

xv. The amendment brought about in the Excise policy 2020-21 is liable to be struck down being arbitrary, without any authority and contrary to the Excise Act. It was contended that even

though the Courts are not equipped to question the correctness of a policy decision but it does not mean that the courts have to abdicate their right to scrutinize whether the policy in question is formulated keeping in mind all the relevant facts and vice of discrimination or unreasonableness. In this regard, learned counsel has placed heavy reliance upon the decision of the Apex Court in **Union of India and others vs. Dinesh Engineering Corporation and another (2001) 8 SCC 491**.

xvi. The case of the petitioners is squarely covered by the judgment of a Division Bench of Punjab and Haryana High Court in **CWP No.5573/2014 (O&M) (Karambir Nain and another vs. The State of Haryana and others)** decided on 11.07.2014 *(2014 SCC Online P&H 12589)* wherein, in identical circumstances, it was opined that no provision under the Punjab Excise Act, 1914 or the Haryana Liquor Licence Rules, 1970 had been shown which would have empowered the State to change the terms of licence during the currency of the licence or change the location of the vends. It was held that the State cannot be permitted to change the rules of the game announced at the time of Excise policy unilaterally. It was further held that though the terms of the licence are statutory in nature, the same cannot be changed by the State in between the licence period, without either seeking consent of the licensees or without giving opportunity to the licensee to repudiate the contract. The judgment as such has been affirmed by the Apex Court in **Special Leave to Appeal (C) No.32734/2014 (State of Haryana and others vs. Karambir Nain and another**) decided on 05.03.2020.

(D) ***If this Court ultimately comes to the conclusion that there is a concluded contract between the parties then, in view of Covid-19 Pandemic and restrictions imposed on sale of liquor, the contract has become frustrated and rendered impossible and unlawful to perform.***

Therefore, its performance has to be excused under Section 56 of the Indian Contract Act, 1872:

xvii. Even if this Court comes to the conclusion that there had been a contract between the parties, the change in law by implementation of Act of 2005 and the entailing circumstances initially prohibiting sale of liquor across the country and then ban on liquor shops and bars/*Ahatas* and restrictions on club, restaurants, marriage parties etc. has frustrated the contract and made it unworkable. In these circumstances, there would not be adequate sale and the petitioners have lost the bargain which they had assessed while submitting their bid and/or as on 16th March, 2020. As such the provisions of Section 56 of the Contract Act would come into play as the bidders shall not be able to perform the contract because the same has become impossible to act upon. Reliance was placed upon the judgment by House of Lords in **Taylor & Another vs. Caldwell & Another, (1863) 3 Best and Smith 826.**

xviii. The licence had different duration and timings and restricted physical operation of the shops in green and orange zones excluding containment area. As such the partial opening of the shops was allowed without licence.

xix. The bifurcation done on the basis of the city/urban area and rural areas in few red zone districts is impossible and arbitrary in view of the Excise policy inasmuch as in few districts like Jabalpur, the shops have been auctioned only in two groups and not individually. If only few shops are allowed to run and few shops are prohibited in one group then again the State shall direct to pay the licence fee for the entire group which is per se illegal and arbitrary.

xx. The new conditions and counteroffer cannot be unilaterally imposed upon the petitioners under the garb of loss of revenue. Section 18 of the Excise Act provides for three privileges for

grant of licence for (1) retail sale of liquor, (2) wholesale of liquor to bars, restaurants, clubs etc. who have privileges for consumption in their premises and (3) privilege of consumption of liquor in the form of shop bars. The respondents have taken away the latter two privileges and imposed arbitrary restrictions on the former. The new conditions imposed upon them are also not acceptable to them.

xxi. Demand of the petitioners is that the minimum duty/minimum lifting of goods under the licence/contract arrangement i.e. the requirement of lifting of 95% value of the total contract has to be dropped and the duty payable by the shops should be based on an actual consumption basis i.e. amount of duty payable would be calculated on actual sale of liquor and beer from the shops. The highest revenue earning and progressive states of Maharashtra and Karnataka also operate on an actual consumption basis.

xxii. The Covid-19 pandemic has been declared as a “force majeure” condition by the Central Government. Since the “force majeure” event was not within the contemplation of the parties and not provided for in the Excise Policy or Licence and Covid-19 pandemic has been categorized as a disaster which has frustrated the terms and conditions and duration of the licence granted under Section 18 of the Excise Act, therefore, it has to be dealt with under Section 56 of the Contract Act and the performance of the contract has to be excused and security deposits are liable to be refunded. The judgment in the case of ***Satyabrata Ghose vs. Mugneeram Bangur and Company, AIR 1954 SC 44*** was cited in support of their contention.

28. Mr. Nagrath, learned senior counsel for the petitioners submitted that the status of the petitioners as on 1st April, 2020 is to be adjudicated. It is to be seen whether the petitioners assumed the status of a licensee or a prospective licensee as on 1st April, 2020 i.e. the date on which the licence period was to be commenced but due to lockdown imposed by the Government it could not

commence. The status of the petitioners is not that of a licensee, therefore, there was no concluded contract and even the subsequent amendment is not binding upon the petitioners. Clause 9.4 of the Excise policy stipulates that if the remaining amount of the earnest money is not deposited within the prescribed period of three days from the date of execution or before 31st March, 2020 as the case may be, the offer made by the group/individual group of the liquor shop would stand cancelled and the same will be reauctioned. Thus, the petitioners cannot be unilaterally compelled to complete the contract. Learned counsel further argued that the State Government was insisting upon the cancellation of the bids of the petitioners. The State has not uttered that they shall cancel the licence of the petitioners. Therefore, by no stretch of imagination it can be said that the process was continuing and the contract itself was concluded. Only the bidding process was complete. After acceptance of the bids no further steps were taken by the respondents, as from 20th March, 2020, Section 144 of CrPC was imposed and w.e.f. 25th March, 2020 onwards lockdown was imposed. After acceptance of the offers, the steps which were required to be taken were not ministerial and miscellaneous. It had the penal consequences and non-compliance of the same would have entailed cancellation of the bids. Once the non-fulfillment of the requirements, which were to be completed by the contractors, was to result in cancellation of bids then they cannot be said to be mere ministerial formalities and that the process was complete or the contract was concluded. Sections 3 to 9 of the Contract Act deal with acceptance and counteroffer. The amendment in the Excise Policy is nothing but a counteroffer made by the State Government as it has imposed new conditions and fixed new licence fee with new time schedule etc.

29. Ms. Chouksey, learned counsel appearing in W.P. Nos.7567, 7576, 7577 and 7578 of 2020 also contended that allotment letter provided for completing certain formalities. There was no concluded contract because certain conditions were not fulfilled; therefore, there was no contract at all.

30. Mr. Sanjay Agarwal, learned counsel for the petitioners appearing in W.P. Nos. 7490/2020, 7520/2020, 8131/2020, 8137/2020, 8139/2020,

8159/2020 and 8260/2020 has adopted the arguments advanced by the learned senior counsel for the petitioners in the leading W.P. No.7373/2020. However, he added that Clause 16.7 of the amended policy dated 23.05.2020 provides for penal consequences. Inasmuch as, a licensee for the year 2020-21, whose licence of a particular Firm has been cancelled then such a Partner/Proprietor or Director of such a Firm or Company is prohibited from participating in any future contracts. This is an amendment in substance in the existing clauses of the policy, which is bad in law. He further submitted that such a clause for blacklisting could not have been added or amended during the currency of the contract.

31. Other counsels for the petitioners also adopted the contentions of learned senior counsel appearing for the petitioners, as noticed hereinbefore.

32. On the other side, besides questioning the maintainability of the writ petitions, in reply to the submissions advanced by the learned counsel for the petitioners, Mr. Tushar Mehta, learned Solicitor General of India, leading the arguments on behalf of the respondents-State has made the following contentions:

(A) ***On the validity of contract between the parties:***

i. Regarding the contention of the petitioners that the contract was not concluded, it was argued that the bids of the petitioners were already accepted for allotment of licence after following the procedure under the Excise Policy 2020-21 and General Licence Conditions. The acceptance/allotment letters were communicated to the petitioners which have been filed by the petitioners themselves as Annexure P-2 and one such acceptance/allotment letter dated 16.03.2020 addressed to M/s Sundaram Trades, Chhindwara (M.P.) has also been placed on record at page 105 of the additional affidavit marked as Annexure R-3 wherein it is specifically mentioned that after accepting the annual value as consideration, the execution is finalized in favour of the said Firm. Under the scheme of the Excise Act, the contract has been concluded; the moment offer/bid was accepted on the terms and

conditions as mentioned therein. The acceptance of the offer has culminated into a binding contract in view of catena of judgments of the Supreme Court in **State of Haryana vs. Jage Ram, (1980) 3 SCC 599, State of Punjab vs. Dial Chand Gian Chand & Co. (1983) 2 SCC 503, State of Haryana and others vs. Lal Chand and others (1984) 3 SCC 634** (para-9) and **Ghaziabad Development Authority vs. Union of India, (2000) 6 SCC 113** (para-5). On these premises, it was also argued that the contention of the petitioners that Article 299 of the Constitution was not followed is misconceived.

ii. It was also argued that even looking to the prayer clause (v) of the writ petition, there remains no room for doubt that there is a concluded contract between the parties and the petitioners are bound to comply with the terms and conditions of the statutory contract.

(B) ***On the mandatory conditions of the Excise Policy and the Excise Act not completed before issuing the licences:***

iii. As regards the mandatory conditions for issue of licences to run the liquor shops, it was contended that the petitioners were issued the offer letters and the mandatory payments required to be made under the Excise Policy have been made by the petitioners during the lockdown only. All the petitioners/ successful bidders were also issued the licences to run the liquor shops and they started operating the liquor shops allotted to them, therefore, the petitioners are not entitled to any relief. Once the bid has been accepted, it is not the discretion on the part of the allottees to decide whether to take licence or not and it is also not the discretion of the State whether to grant licence or not.

iv. Clauses 9.4, 10.1.3 and 10.1.4, 20, 21, 44 of the Excise Policy which are relied upon by the counsel for the petitioners operate post concluded contract and therefore, they do not confer any

advantage to the case of the petitioners to hold that the contract was not concluded between the parties.

v. Combating the argument with regard to format of the licence it was argued that the provisions for allotment/issue of licence for liquor shops/bars are provided in both the Excise Policy and the General Licence Conditions. The other statutory Rule which governs the licence regime are made under Section 62 of the M.P. Excise Act, 1915, namely, M.P. Foreign Liquor Rules, 1996 and M.P. Country Spirit Rules, 1995. The Licence is issued as per the format prescribed under the aforesaid two statutory Rules.

(C) ***On the power of the State to change its Excise Policy and amend the terms and conditions of licence:***

vi. The State Government in exercise of powers conferred upon it by virtue of Section 62 of the Excise Act has framed the Rules prescribing General License Conditions governing the terms and conditions of the licence granted to the petitioners. In terms of Rule XXXIII of the statutory General License Conditions the State Government is empowered to amend the conditions of licence.

vii. Regarding the unilateral changes made in the conditions of the policy, it was contended that all the successful bidders including the petitioners herein have also submitted a statutory affidavit wherein, in Clause 13 they have undertaken to abide by the change, if any, made by the State Government in the conditions of the Excise Policy 2020-21 during the licence period. Contention of the petitioners was negatived in view of the judgment of the Supreme Court in **Mohd. Fida Karim and Another vs. State of Bihar and others (1992) 2 SCC 631**.

viii. No coercive steps were taken against the petitioners and neither any penalty has been imposed. Letters referred to by the

petitioners were issued for completing the remaining conditions in terms of letter of acceptance. There is no violation of any order of this Court.

ix. As regards the insertion of new Clause 16.7 by way of amended policy in relation to blacklisting is concerned, learned counsel submitted that such a clause for debarring certain persons from bidding is already there in Rule III of the Rules of General Application framed in exercise of powers conferred by Section 62 of the Excise Act and therefore, it is wrong to say that a new clause of blacklisting has been added during the currency of the contract.

x. Learned senior counsel for the respondents by inviting our attention to the order dated 31.03.2020 (Annexure R-4) submitted that the State Government has given a fair deal not only to the petitioners but to those also who have not approached this Court. Even before the licence period would have actually commenced, the interest of the successful bidders, which may have been affected due to non-operation of liquor shops during the lockdown period, was protected to some extent thereby waiving the licence fee proportionally for the period they could not operate their shops. Thus, the loss of bargain by the petitioners is only an apprehension.

xi. The State has amended its Excise policy vide Notification dated 23.05.2020 to its own detriment and to the advantage of the successful bidders including the petitioners. It has given three very significant concessions to the successful bidders, which would mitigate the loss if any estimated by the petitioners. They are:

(i) Vide Clause 2 and 3 of the Notification, MRP for sale of "domestic" liquor is increased from 15% to 25% and for foreign liquor from 10% to 20%, which would give more revenue for the liquor shop owners;

(ii) In clause 6(70) of the Notification, an option is given to petitioners to increase the term of the contract by two months i.e. till 31.05.2021 instead of 31.03.2021. This is expected to compensate the loss occurred in April and May, 2020. Thus, the argument that full 12 months are not available to the petitioners, no longer survives. Here it was also contended that the argument that full 14 hours of sale period was not made available also does not stand as by order dated 31.05.2020, the time for opening the shops is 7 a.m. to 9 p.m. i.e. 14 hours.

(iii) Clause 6(70.2) also gives relaxation for payment to provide immediate relief to the petitioners. Originally for two months i.e. May and June, 10% per month is to be paid, which has been reduced to 7.5% in May and June. The balance payment of these months would be payable subsequently when the sale would increase.

xii. These are not the new conditions or a fresh proposal given by the State. It is only an option, which is clear from Clause 70.6 of the amended policy. It is always open to the petitioners not to accept the same. The State has given better option and the petitioners cannot treat it as a counteroffer.

xiii. It was further contended that even after availing the aforesaid concessions, if the petitioners find that they are at loss in operating the allotted liquor shops, they have an option of invoking clause 49 of the Excise policy which provides that if due to any social political, legal reason any liquor shop is closed and due to lack of sales the licence holder is not able to pay minimum excise duty, the licence holder would be eligible for waiver of excise duty to the extent of loss. Such an application may have to be submitted before the District Committee who would send a fact-finding report to the State Government and on that basis the decision on waiver of excise duty would be taken.

xiv. As per clause 48 of the Excise policy, if due to any policy decision of the Government or due to natural calamity, the licensee/allottee is not able to operate the allotted liquor shops, the licensee shall not be entitled for any compensation/ reimbursement by the Government or authorities.

xv. It was contended that in view of the judgments of the Apex Court in **Raunaq International Ltd. vs. I.V.R. Construction Ltd. (1999) 1 SCC 492, Air India Limited vs. Cochin International Airport Ltd. and others (2000) 2 SCC 617** and **Chingalal Yadav vs. State of M.P., 2010 SCC Online MP 110**, the Courts should not into interfere in the matters of tenders unless the transaction is found to be *mala fide*. Under the exercise of power of judicial review of the policy decision, the Courts must proceed with great caution while exercising their discretionary powers and should exercise these powers only in furtherance of public interest and not merely on making out a legal point.

xvi. There is also no violation of the provisions of Section 17 of the Excise Act.

(D) ***On the applicability of the judgment in Karambir Nain****'s case* ***(supra)***

xvii. Denying the applicability of the Division Bench judgment of Punjab & Haryana High Court in **Karambir Nain**'s case (**supra**), it was contended that the facts of the said case are totally different. In that, the State of Haryana pursuant to its excise policy had auctioned liquor vends and licences were issued to the successful bidders and subsequently, the policy was amended by inserting Clause 2B, which related to shifting and surrender of liquor vends, which was detrimental to the interest of the petitioners therein and moreover, there it became impossible or prohibited in law to perform the contract but here the amendment in the Excise policy by Notification dated 23.05.2020 is entirely to the benefit of the petitioners, which has already been mentioned hereinabove. Secondly, in the facts of

the said case, there was no provision in the Punjab Excise Act, 1914 or Haryana Liquor Licence Rules, 1970 enabling the State to change the terms of the licence and excise policy as was held in para 23 of the judgment but in the present case, the State Government has not amended the licence or the contract in any manner.

(E) ***On restrictions imposed on sale of liquor and amended policy:***

xviii. Relying upon the judgment of the Supreme Court in **State of Kerala vs. Kandath Distilleries (2013) 6 SCC 573** it was urged that a citizen has no fundamental right to trade or business in liquor, as a beverage and the activities, which is res extra commercium, therefore, the State can impose reasonable restrictions in the sale of liquor which may be different than imposed on other business and even the State could part with this privilege as per its liquor policy.

(F) ***On the applicability of Section 56 of the Indian Contract Act, 1872:***

xix. Apropos the argument of the petitioners that sale of liquor is frustrated or become impossible to perform under Section 56 of the Contract Act, it was vigorously argued that merely because the contract has subsequently become onerous to perform or on grounds of equity it is not frustrated. Out of the whole one year, if the petitioners have not been able to run their shops for two months and that out of 14 hours, the timings for opening of the shops were restricted after lifting the lockdown and certain other restrictions were imposed, is no ground to say that for the whole year it has become impossible to operate the licence. It may have become little less profitable but not impossible to be performed. There is also no question of contract becoming unlawful. Therefore, the case of the petitioners can never fall under Section 56 of the Contract Act as it has neither become impossible nor unlawful to perform.

xx. The restrictions such as liquor shops were directed to remain closed due to lockdown; full timings of 14 hours were not available even after they were permitted to open the shops and that shop bars were not permitted to open, were not imposed by the State Government. These restrictions came into force by virtue of the order of the Central Government under Section 6 of the Act of 2005.

xxi. It was submitted that it is not the case of non-performance of the contractual requirement by the State. There is no violation of any obligation on the part of the State. It was also contended that Section 56 of the Contract Act is not applicable in the present case because of the inbuilt provisions of the Excise Policy.

xxii. It was further argued that it is a settled legal position that a contract is not frustrated or rendered impossible to perform merely because certain circumstances in which it was made are altered.

xxiii. The consequences of non-performance of the contract due to any natural calamity or policy decision of the State are clearly enumerated in Clauses 48 and 49 of the Excise policy, therefore, also Section 56 of the Contract Act has no applicability. Reliance was placed upon **Mary vs. State of Kerala, (2014) 14 SCC 272**.

xxiv. It was contended that the provisions of Section 56 of the Contract Act do not apply when the parties contemplate the force majeure event and its consequences. Reliance was placed upon the judgment of the Supreme Court in **Satyabrata Ghose (supra)**.

xxv. It was also argued that out of 351 total allottees, only 47 allottees initially approached this Court. Once the contract is completely possible to perform by a majority of the successful bidders then it cannot be said to be impossible to be performed by the minority of the contractors. Still further, in pursuance to an interim order dated 04.06.2020, a large number of successful

bidders including as many as 90 petitioners herein have submitted the affidavits showing their willingness. Thus, they do not have any grievance with the continuance and performance of the contract. By placing reliance on a single Bench decision of Kolkata High Court in **M/s Besco Limited vs. The West Bengal State Electricity and Distribution Company Ltd. (2015) SCC Online Cal 6867: AIR 2015 Cal 288**, it was submitted that for Section 56 of the Contract Act to be applicable, the entire contract must be impossible to perform.

xxvi. Learned senior counsel relied upon the judgment of the Supreme Court in **Energy Watchdog vs. CERC, (2017) 14 SCC 380** to contend that for Section 56 to apply, the entire contract must become impossible to perform. The restrictions imposed due to orders of the Central Government under Section 6 of the Act of 2005 are temporary in nature and such temporary restrictions which by efflux of time have already been lifted to a great extent do not render the contract frustrated or impossible to perform. In the said judgment, the Apex Court held that Courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events. Attention was also invited to the judgment of House of Lords and Privy Council reported as **F.A. Tamplin Steamship Company Limited vs. Anglo-Mexican Petroleum Products Company Ltd., 1916 (2) AC 397.**

(G) ***Regarding maintainability of the writ petition*:**

xxvii. Learned senior counsel for the respondents-State has vehemently argued that the petitioners have not approached this Court with clean hands. Their main intention is to avoid the contract and therefore, the petition for avoidance of contract in writ jurisdiction is not maintainable, as held in **Lal Chand (supra)**

and **Joshi Technologies International Inc. vs. Union of India, (2015) 7 SCC 728.**

xxviii The petitioners have approached this Court merely on apprehension of loss and impossibility to perform the contract is merely an assumption. Since these are disputed questions of fact, therefore, the writ petition is not maintainable. Reliance was placed upon the judgment in **LIC of India vs. Asha Goel (2001) 2 SCC 160**.

33. By putting a deep dent on the contentions made by the learned senior counsel for the respondents-State, learned senior counsel for the petitioners in his rejoinder arguments put forth the following submissions:-

(i) Although the bid was accepted on 16.03.2020 (Annexure P-2) with the payment of 1% earnest money and remaining amount of 4% was also paid on 20.03.2020 in terms of Clause 9.4 of the policy but the documentation and payment taken together in terms of clause 9 and 10 of the policy, shall alone constitute entitlement for licence and when the licence is issued to the petitioners then only the contract would stand concluded. The payment of earnest money was to be followed by bank guarantee of 11% and post-dated cheques, 1/12th of the value of 95%, followed by counterpart agreement on Rs.500/- stamp paper as per clause 21 of the policy but admittedly no licence could be issued on 01.04.2020 before commencement of the licence period due to subsequent events. Thus, since there is no concluded contract between the parties, therefore, question of wriggling out of the same does not arise.

(ii) Section 28 of the Excise Act limits the power of the respondents to grant licences only as per the form, duration, fees, restrictions and conditions as prescribed. The payment of fees is the pre-condition of issue of licence and therefore, it is not appropriate on the part of the respondents to say that since the bid was accepted and acceptance letter was issued on 16th March, 2020, therefore, the petitioners have no case to plead that contract was not complete. The words "may

require" occurring in sub-section (2) of Section 28, are to be read as "shall require" because the conditions of the policy are mandatory conditions as the petitioners are also required to pay the penalty on the quantity of liquor short lifted. Rule XXXIII of the General License Conditions and Clause 13 of the affidavit submitted by the petitioners cannot undermine or alter the provisions of Section 28 of the Excise Act. The Rules framed under the said Act by way of General Licence Conditions cannot override the operation of Section 28 of the Act.

(iii) It was further contended that Section 29 of the Excise Act confers power on the authority granting licence to take security from licensee. Although it is prescribed that any authority granting a licence under the Act may require the licensee to execute a counterpart agreement but the words "may require" contained therein have to be read as "shall require" because these are the mandatory conditions for issue of licences as per the requirement of the policy and unless the condition is satisfied, the Authority does not part with the licences.

(iv) With regard to furnishing of affidavit by the bidders as per Clause 18.3 of the Policy, it was urged that only copy of the affidavit was to be uploaded online as a precondition to the bid. The original affidavit was to be submitted along with other documents at the final stage before issue of licences but due to lockdown it could not be done. It was further argued that at any rate such an affidavit would not override or change the effect and requirement of mandatory provisions of the Excise Act and the Excise Policy.

(v) It was contended that unless the conditions prescribed under the provisions of Sections 17, 18, 28 and 29 of the Excise Act and Clause 9.4, 10 (10.1.1, 10.1.3, 10.1.4, 10.1.6 and 10.1.7) and 21 of the Policy are fulfilled, there is no question of issue of licences and under the peculiar facts and circumstances of the case, neither these conditions were fulfilled nor could have been fulfilled. If these

provisions are read as a whole, the finalization of acceptance of bid would complete with the issue of licence which will be done only after these conditions are complied with.

(vi) Rule XXXIII of the General Licence Conditions cannot take away the purport of Sections 17 & 28 of the Excise Act.

(vii) It was further contended that it was obligatory upon the respondents to issue the licences and get the remaining formalities completed before commencement of the licence period. The failure on the part of the respondents to provide a clear passage to the petitioners even though beyond their contemplation due to an intervening circumstance has frustrated implementation of the contract. Reliance was placed upon the judgment in **Delhi Development Authority vs. Kenneth Builders and Developers (P) Ltd. and others, (2016) 13 SCC 561.**

(viii) The terms and conditions of the agreement as existed at the time of auction have been completely altered. The new terms and conditions imposed by the State are akin to a counteroffer. Therefore, reliance placed by the respondents upon the judgments in J**age Ram**'s case **(supra); Dial Chand Gian Chand**'s case **(supra); Lal Chand**'s case **(supra)** and **Joshi Technologies International**'s case (**supra**) is misconceived. The petitioners gather strength from the judgment of the Supreme Court in **Syed Israr Masood, Forest Contractor, Ret Ghat, Bhopal vs. State of M.P., (1981) 4 SCC 289.**

(ix) It was also argued that there is no bar in invoking the writ jurisdiction in contractual matters where on a given set of facts, the State acts in an arbitrary manner. Attention was invited to the decision of the Supreme Court in **Monarch Infrastructure (P) Ltd. vs. Commissioner, Ulhasnagar Municipal Corporation and others, (2000) 5 SCC 287**. It was stated that judgment in the case of **Chingalal Yadav** (supra) relied upon by the respondents itself lists out arbitrary actions as an exception warranting interference in policy matters.

(x) Relying upon the judgment of the Supreme Court in **ABL International Ltd. and others vs. Export Credit Guarantee Corporation of India Ltd. and others, (2004) 3 SCC 553**, learned counsel for the petitioners further urged that in contractual matters there is no absolute bar for entertaining a writ petition even if some disputed questions of fact are involved.

(xi) Clause 13 of the affidavit only provides for the State Government to make changes to the policy and such power has not been vested with the Excise Department and Collectors. The changes cannot be made arbitrarily. Even after amendment, the Excise Policy dated 23.05.2020 remains practically impossible to perform and unworkable.

(xii) Mr. Nagrath, learned senior counsel also made an alternative submission that even if it is assumed though denied that the contract between the parties had been concluded, the amendment made in the policy vide Notification dated 23.05.2020 amounts to novation of contract and as such no change in the terms and conditions of the policy which existed at the time of acceptance of the contract, could have been made unilaterally. No consent of the petitioners was obtained prior to issuing the amended policy and similarly all subsequent decisions taken by the respondents are arbitrary and without there being any consent of the successful bidders. It was further argued that after communication of acceptance of the offer, the respondents-State should not have taken a different stand by amending the policy.

(xiii) With regard to power to amend the policy, the stand of the petitioners is that Section 63 of the Excise Act provides for mandatory publication of all rules and notification under the Act in the official gazette. The Excise Policy 2020-21 dated 25.02.2020 and the amended policy issued on 23.05.2020 was published by virtue of Section 63 of the Act but all other concessions and things like changing the timings of shops, period of licence, curtailing the

Ahatas etc. have been done without any Notification published in the Gazette by the Excise Officers, which is not prescribed under the law. All such requirements flowing from the policy could not have been changed without following the due procedure prescribed under Section 63 of the Excise Act. Reliance was placed upon the judgment of the Supreme Court in in **Bharat Sanchar Nigam Limited and another vs. BPL Mobile Cellular Limited and others, (2008) 13 SCC 597**.

(xiv) The judgment in **Karambir Nain**'s case (supra) is complete answer to the case of the petitioners and it is not at all distinguishable. In the facts of the said case, only the sale of liquor on Highways was prohibited effected by the Court's order and not the other shops. It was a case of sale of liquor becoming partially prohibited during the currency of the licence, whereas, herein by virtue of orders passed under the Act of 2005, the sale of liquor became prohibited and absolutely unlawful. So, in the case of the present petitioners, entire bargain for which the petitioners had made the offers has gone. Still there is a partial opening of the shops and there are certain containment zones Thus, the case of the petitioners is on much higher footing than **Karambir Nain**'s case (supra) and it is applicable on all fours. Moreover, the respondents have not dealt with the decision in **Karambir Nain**'s case (supra) as the argument of novation has not been dealt with.

(xv) Clause 48 of the Excise Policy 2020-21 does not contemplate the pandemic circumstances and implementation of the Act of 2005, therefore, Section 56 of the Contract Act applies on all fours.

(xvi) Clause 48 of the policy deals with the compensation claimed by the petitioners and it does not provide that refund of the earnest money will not be granted. The petitioners would rather rely upon Clause 54 of the policy, which provides for refund of the amount so deposited in compliance of process fee/conditions for allotment of

liquor shop(s) in case any unavoidable circumstance arises due to which the auction process is required to be cancelled.

(xvii) Clauses 48 and 49 of the Excise policy and Clause 33 of the General License conditions are not applicable to the case of the petitioners. Inasmuch as these provisions would be applicable in an ongoing contract whereas no licences were in operation as on 01.04.2020 as admittedly, no licences were issued till the first week of May, 2020. Further, the Clause 49 only deals with closure of shops due to social, political, legal reasons and due to lack of sales if the licence holder is not able to pay minimum excise duty, a waiver could be sought to the extent of loss equivalent to the number of closure days.

(xviii) It was also canvassed that clauses 49 and 54 of the policy of the last year gave benefit to the earlier liquor vends.

(xix) The contention of the respondents that Section 56 of the Contract Act is not applicable because there are inbuilt provisions in the Excise policy is baseless. The scenario which has happened after breaking out of Covid-19 pandemic, has rendered the contract unlawful, impossible and unworkable. As per the case of the petitioners, due to salient and most profitable aspects of the contract and the actual bargain which the petitioners had expected before submitting their bids having been taken away, it has practically become impossible to perform the contract. As such Section 56 of the said Act would apply. Strength was drawn from the pronouncement of the Supreme Court in the case of **Smt. Sushila Devi and another vs. Hari Singh and others, (1971) 2 SCC 288** wherein the impossibility has been described as a practical impossibility.

(xx) Admittedly, since no licence was issued or the status of the petitioners was not that of a licensee therefore, clause 48 of the Excise policy would not be applicable.

(xxi) Though it is vehemently denied but even if it is held that the petitioners were licensees then also the licensee is not entitled to claim loss of profit under clause 48 of the policy. The petitioners are not asking for any compensation whether loss of profit or loss of expenses despite the fact that by virtue of lockdown the operation of licences became impossible because it was an offence to sell the liquor under the Act of 2005. Under the circumstances where the licensee was prohibited from the sale of liquor and operation of the licence either became unlawful or impossible, the petitioners would walk away happily after taking the advances they have given.

(xxii) Even if the stand of the respondents is accepted that Clause 48 of the policy is a force majeure clause then also the agreement stands frustrated and the petitioners are excused from its performance. The said plea has been enumerated in para 14 of reply of the petitioners to additional affidavit.

(xxiii) The judgment in ***Energy Watchdog***'s case (**supra**) has been misunderstood by the respondents. The Supreme Court has clearly observed that insofar as a force majeure event occur *de hors* the contract, it is dealt with by a rule of positive law under Section 56 of the Contract Act.

(xxiv) The Excise policy does not contemplate the possibility of an uncertain event like lockdown, pandemic or ban on operation of bars/restaurants and containment areas etc. Therefore, in view of the judgment in **South East Asia Marine Engineering and Constructions Ltd. vs. Oil India Ltd., 2020 SCC Online SC 451** the petitioners are exempted from further performance and the contract becomes void.

(xxv) The piece meal measures adopted by the Government cannot make a frustrated contract workable.

(xxvi) Increase of small amount in MRP is of no help to the petitioners because there are many shops in the city and all have to compete

with each other to increase the sales, which is not possible in the current situation. Still there is no likelihood of commencing large scale marriage ceremonies, parties and restaurants with gatherings in near future, which makes the future very uncertain. There were three privileges provided to the petitioners with the contract i.e. (i) sale from a shop, (ii) sale from bar, restaurants etc. and (iii) sale of liquor from *Ahatas*. Out of these three privileges, only one privilege remains i.e. to sell the liquor from shop. The respondents have tried to make up the loss of those two privileges by saying that either the petitioners would earn more profit due to increase in the MRP or by giving extra two months for the loss of two months from 1st April, 2020 and for that also the petitioners would be charged additional licence fee for those extra two months. This is nothing but exchange of offer and counteroffer. The petitioners have a right to get those privileges because they are conferred by Rule 8 of the M.P. Foreign Liquor Rules, 1996 and Rule 9 of the M.P. Country Spirit Rules, 1995.

(xxvii) The relaxations granted by the respondents are mere restructuring of existing arrangement whereas other States like State of Punjab, State of Uttar Pradesh, State of Haryana and State of Himachal Pradesh are operating on minimum guarantee quota system.

(xxviii) The licensees who have submitted affidavits of their willingness to operate the liquor shops in pursuance to interim order dated 04.06.2020 are merely 37% in terms of total revenue of the State whereas the licensees who have kept their shops shut constitute around 63% in terms of total revenue of the State. Therefore, the higher percentage of the liquor shops constituting total revenue of the State which are unwilling due to obtaining circumstances would shift the balance of convenience in favour of the petitioners and not the higher number of successful bidders agreeing to continue with the contract on new conditions because they are very small shops with meager revenue. In law, the acceptance by majority would

make no difference to an individual's right. As on the date of issue of licences on 2nd May, 2020 and even till 24th June, 2020, liquor vends in major cities like Bhopal, Indore and Ujjain were completely closed.

(xxix) After the unwilling licensees have surrendered their shops, the State Government somehow with its own resources started operating the shops and even tried to re-auction them for a period of seven days. The fact that they could not get bids more than 20% of the shops and thereafter, they had to even relax the mandatory conditions of reserve price vide letter dated 12.06.2020 (Annexure A-4 to IA No.4322/2020) and then order dated 13.06.2020 (Annexure A-6 to IA No.4322/2020) was issued to indirectly revalue the tender price upto 80% of the amount of the reserve price. Still they were unable to attract the bidders itself shows that for smooth running of the shops in 2020-21, the annual value of the shops has to be reduced and revalued, which is the main relief of the petitioners for which the petitioners have time and again given appropriate offers to the respondents/State but to no avail. On the contrary, the respondents have started treating the petitioners who have surrendered the shops as the defaulters and blacklisting them.

34. In rebuttal to the arguments advanced by the learned counsel for the petitioners in rejoinder, Mr. Mehta, learned senior counsel for the respondents in the first place submitted that due to subsequent developments, which have taken place after the interim order dated 04.06.2020, now out of total 380 groups of liquor shops for auction/renewal, 323 groups are continuing with the contract and only 57 groups have abandoned their contracts. Learned counsel further argued that the petitioners have not disputed that all the petitioners uploaded the signed affidavits in the prescribed format online along with their bid in terms of Clause 18.3 of the policy. Merely because they subsequently did not submit the original copy, does not mean that they are not bound by clause 18.3 of the policy. After fulfillment of all the necessary conditions for submission of the bids, the bids were accepted and

communication of the same was made to all the petitioners in terms of Sub-clause (6) of Clause 15.27 of the Excise Policy. Regarding the contention that additional licence fee is being charged for extension of contract by two months i.e. April and May, 2021, it was urged that the petitioners have already been provided several other concessions including waiver of licence fee for the loss of two months which has been caused, if the annual value of the contract is Rs.120.00 Crore, the same would be reduced by Rs.20.00 Crore and the petitioners would be adequately compensated for the lost period. Otherwise also it is an option and not mandatory and the fee that would be charged is proportionate additional licence fee at the same bid rate as was applicable for the year 2020-21. He further submitted that by order dated 28.05.2020 attached to additional affidavit, the State Government also allowed sale of liquor in red zones. Thus, the restriction on sale of liquor in green and orange zone was only for about a month and about two months in the red zones. If any shop has remained closed in any containment zone, then minimum guarantee submitted by the petitioners as per Rule 9(1)(a) of M.P. Country Spirit Rules, 1995 and Rule 8(a) of M.P. Foreign Liquor Rules, 1996 for each shop, in respect of that shop shall proportionally stand reduced in terms of order dated 31.03.2020 of the State Government and thus, no loss would be incurred by the petitioners. Learned counsel further argued that the so-called report of the committee giving recommendations in favour of the petitioners cannot be relied upon because the said report was undated and unsigned and it was never submitted to the Government. In sur-rejoinder, the respondents have already pointed out that the said committee was cancelled in view of constitution of another committee of Group of Ministers. Relying upon the judgment of the Supreme Court in **State of M.P. vs. Tikamdas, (1975) 2 SCC 100**, it was contended that in terms of Section 62 read with 63 of the Excise Act, the State is empowered to make Rules and even amendment can be made retrospectively. Learned counsel further argued that the amended policy was also published in the Gazette, therefore, there is no violation of Section 63 of the Excise Act.

35. We have heard learned counsel for the parties at length.

36. In the present case, on the basis of the pleadings and contentions advanced by the learned counsel for the parties and the obtaining facts and circumstances of the case, the following questions arise for consideration:-

(i) Whether a valid and enforceable concluded contract has come into existence between the parties so as to bind the petitioners to comply with the statutory and legal obligations arising therefrom?

(ii) Whether the State is correct in unilaterally issuing the licenses with changed terms and conditions?

(iii) Whether the amended Excise Policy issued on 23.05.2020 is valid and legal?

(iv) Whether in the facts and circumstances of the present case, if the answer to Question (i) above is in the affirmative, the contract between the parties became impossible to perform or unlawful so as to excuse the petitioners from its performance in terms of Section 56 of the Contract Act?

(v) Whether Clauses 9.6, 10.1.4, 10.1.5, 10.1.9, 44 and 48 of the Excise Policy 2020-21 dated 25.02.2020 are contrary to the provisions of M.P. Excise Act, 1915?

(vi) Whether the writ petition is maintainable in the present facts and circumstances, as raised by the respondents?

37. Before we delve into the arguments advanced by the learned counsel for the parties, it would be essential to examine the material clauses of the Excise Policy 2020-21, Foreign Liquor Licence and the Country Spirit Licence issued to the petitioners, General Licence Conditions and the relevant statutory provisions of the Excise Act, the Contract Act and other ancilliary statutes referred to by the learned counsels.

38. Clause 9 of the Excise policy provides for the earnest money and how it is to be deposited. Clause 9.1 thereof provides for depositing earnest money @ 5% of the reserve price of the liquor shop. The relevant clause 9.4 thereof

provides that for the execution of the liquor shops group/single group for the contract period 2020-21, the tenderer has to deposit earnest money @ 2% for groups of reserved value upto Rs.10 Crore and for groups with a reserve price of more than Rs.10 Crore @2% upto Rs.10 Crore + 1% of the balance amount of more than Rs.10 Crore on NIC portal with e-tender (closed bid and auction) and the remaining amount is to be paid within a period of three days from the date of auction or upto 31st March, 2020, whichever is earlier. In case, the remaining amount of the earnest money is not deposited within the prescribed time limit, the offer shall be cancelled without any notice and the liquor shops will be placed for re-auction. The relevant Clause 9.4 reads as under:-

> **''9. धरोहर राशि एवं उसको जमा कराया जानाः–**
>
> *** *** ***
>
> 9.4 ई–टेण्डर (क्लोज बिड एवं ऑक्शन) द्वारा वर्ष 2020–21 की ठेका अवधि के लिए मदिरा दुकानों के समूह/एकल समूहों के निष्पादन हेतु टेण्डरदाता को राशि 10 करोड़ तक आरक्षित मूल्य के समूहों के लिये 2 प्रतिशत तथा 10 करोड़ से अधिक आरक्षित मूल्य वाले समूहों के लिये 10 करोड़ तक 2 प्रतिशत + 10 करोड़ से अधिक शेष राशि का 1 प्रतिशत अर्नेस्टमनी राशि देय होगी । उक्त राशि ई–टेण्डर (क्लोज बिड एवं ऑक्शन) के साथ NIC पोर्टल https://mptenders.gov.in पर ऑन लाईन जमा करानी होगी व शेष राशि निष्पादन की तिथि से 03 दिवस के अंदर अथवा दिनांक 31 मार्च 2020 जो भी पहले हो तक, साईबर ट्रेजरी में ऑन लाईन जमा करानी होगी। 03 दिवसों की गणना में निष्पादन की कार्यवाही का दिन एवं अवकाश के दिन (बैंक बंदी दिवस अथवा बैंक हड़ताल दिवस सहित, यदि कोई हो) को गणना में नहीं लिया जायेगा । धरोहर राशि की शेष राशि उपरोक्त वर्णित अवधि में जमा न किये जाने पर पृथक से बिना किसी अन्य सूचना के संबंधित मदिरा दुकानों के समूह/एकल समूह का ऑफर स्वतः निरस्त मान्य किया जायेगा तथा ऐसी मदिरा दुकानों के समूह/एकल समूह पुनः निष्पादन पर रखे जावेंगे।''

Clause 9.6 of the Excise policy stipulates that in case the earnest money as aforesaid is not deposited within the time prescribed in clause 9.4 then the offer/licence issued in favour of the concerned liquor shop group/single group shall be cancelled and the liquor shop(s) will be again re-auctioned at the risk of the existing highest offerer. The successful bidder who participated in the e-tender process cannot later back out from the process. If he does so, the amount deposited by him shall be forfeited and legal proceedings will be initiated against him. Clause 9.6 is in the following terms:-

> 9.6 वर्ष 2020–21 की ठेका अवधि के लिए ई–टेण्डर (क्लोज बिड एवं ऑक्शन) द्वारा मदिरा दुकानों के समूह/एकल समूहों के निष्पादन की प्रक्रिया में धरोहर राशि उपरोक्तानुसार जमा न किये जाने पर पृथक से बिना किसी अन्य सूचना के संबंधित मदिरा दुकानों के समूह/एकल समूहों का ओफर/लायसेंस निरस्त किया जायेगा व उसका पुनर्निष्पादन वर्तमान उच्चतम ओफरदाता के उत्तरदायित्व पर किया जावेगा। ई–टेण्डर (क्लोज बिड एवं ऑक्शन) के माध्यम से र्निष्पादन की प्रकिया में भाग लेने वाला सफल भागीदार पीछे नहीं हट सकता है अर्थात बैक–आउट नहीं कर सकता है, ऐसा करने पर सफल भागीदार द्वारा जमा की गई निर्धारित धरोहर राशि राजसात की जा सकेगी तथा उसके विरूद्ध विधि सम्मत कार्यवाही की जायेगी।

Clause 10 of the Excise policy provides for security deposit and how it is to be deposited. It is enumerated therein that for the contract period 2020-21, the security deposit shall be equivalent to 11% of the amount which comes after deducting the earnest money from the total annual value of the liquor shop groups/single groups, which will be submitted in the form of bank guarantee from any authorised and approved Bank/Financial Institution. Clause 10.1.3 thereof specifically enumerates that the bank guarantee as mentioned in clause 10, which shall be valid till 30.04.2021, shall be deposited within 10 days of the offer or before 31.03.2020, whichever is earlier. The relevant clause reads, thus:-

> ''10.1.3 लॉटरी आवेदन पत्र के माध्यम से चयनित आवेदक/ई–टेण्डर (क्लोज बिड एवं ऑक्शन) में सफल टेण्डरदाता द्वारा वर्ष 2020–21 की ठेका अवधि के लिये सम्पूर्ण प्रतिभूति राशि संबंधित जिले के सहायक आबकारी आयुक्त/जिला आबकारी अधिकारी के पक्ष में जारी किसी भी राष्ट्रीयकृत/अनूसूचित/क्षेत्रीय ग्रामीण बैंक की स्थानीय शाखा में देय बैंक ड्राफ्ट/बैंकर्स चैक/बैंक कैश ऑर्डर के रूप में प्रस्तुत की जा सकेगी अथवा संबंधित जिले के सहायक आबकारी आयुक्त/जिला आबकारी अधिकारी के पक्ष में बन्धक किसी भी राष्ट्रीयकृत/अनूसूचित/क्षेत्रीय ग्रामीण बैंक की बैंक गारंटी/सावधि जमा के रूप में, जिसकी परिपक्वता अवधि कम से कम, 30.04.2021 तक की होगी, निष्पादन के दिनांक से 10 दिवस की अवधि में अथवा 31 मार्च, 2020 के पूर्व जो भी पहले आये प्रस्तुत की जा सकेगी। प्रतिभूति की राशि साईबर ट्रेजरी में ऑन लाईन भी नियत अवधि में जमा करायी जा सकेगी।''

Under Clause 10.1.4 of the policy, the licence of the concerned liquor shop shall be issued only after security deposit is made within the time prescribed under Clause 10.1.3 failing which the offer shall stand revoked/cancelled and the shops will be placed for re-auction through e-tender. The said clause is reproduced as under:-

> ''10.1.4 संबंधित मदिरा दुकानों के समूह/एकल समूहों का लायसेंस, प्रतिभूति राशि जमा हो जाने के पश्चात् ही जारी किया जायेगा। ई–टेण्डर (क्लोज बिड एवं

ऑक्शन) द्वारा जिन मदिरा दुकानों के एकल समूहों का निष्पादन दिनांक 26 मार्च 2020 के पश्चात की किसी तिथि को अंतिम होता है, तो ऐसी स्थिति में प्रतिभूति की राशि निष्पादन तिथि से 05 दिवस की अवधि में अर्थात दिनांक 31 मार्च 2020 तक के बाद भी जमा करायी जा सकेगी किंतु प्रतिभूति की राशि जमा होने पर ही लायसेंस जारी किया जायेगा । ऐसी स्थिति में मदिरा दुकान का संचालन न होने के लिये वह स्वयं उत्तरदायी होगा, इसके लिये उसे किसी प्रकार की क्षतिपूर्ति की पात्रता नहीं होगी। सफल टेण्डरदाता द्वारा प्रतिभूति की राशि विनिर्दिष्ट अवधि में जमा नहीं कराये जाने पर उसके उत्तरदायित्व पर उक्त मदिरा दुकान के एकल समूह का पुनर्निष्पादन किया जायेगा। पुनर्निष्पादन के फलस्वरूप जो भी खिसारा आयेगा उसकी वसूली संबंधित से भू–राजस्व के बकाया की भांति की जायेगी।''

In terms of Clause 10.1.5, the Bank guarantee or fixed deposit will be accepted from renewal applicant/lottery application form only in the name of the selected applicant/successful tenderer (Individual/Partnership Firm/ Company/Consortium). Verification of the Bank guarantee at the District level will be mandatory. The said clause is as follows:

''10.1.5 प्रस्तुत बैंक गारण्टी अथवा सावधि जमा नवीनीकरण आवेदक/लॉटरी आवेदन पत्र के माध्यम से चयनित आवेदक/सफल टेण्डरदाता (व्यक्ति/भागीदारी फर्म/कम्पनी/कन्सोर्टियम (Consortium) के नाम से जारी होने पर ही स्वीकार की जायेगी। बैंक गारण्टी का जिला स्तर पर सत्यापन कराया जाना अनिवार्य होगा।''

Clause 10.1.6 of the policy deals with the situation wherein the applicant/successful tenderer selected through lottery does not deposit the entire amount of security within the stipulated time from the date of execution of liquor shops group/single groups and by depositing 50% of the security amount due, online in advance with the cyber treasury within the stipulated time period, and the Bank undertakes to submit the balance 50% amount by 30th April, 2020, so the applicant's licence application will be accepted (subject to the restriction that 50% advance online deposit of security payable, deposited in the main revenue head 0039 State Production Duty, its adjustment will be ordered/validated against the prescribed minimum guaranteed EUT/EMD payable in the month of March, 2021). It is as under:-

''10.1.6 लॉटरी द्वारा चयनित आवेदक/सफल टेण्डरदाता मदिरा दुकानों के समूह/एकल समूहों के निष्पादन के दिनांक से निर्धारित समयावधि में यदि प्रतिभूति की सम्पूर्ण राशि जमा नहीं करता है तथा निर्धारित समयावधि में प्रतिभूति की देय राशि की 50 प्रतिशत राशि अग्रिम साईबर ट्रेजरी में ऑन लाईन जमा कर, शेष 50 प्रतिशत राशि की बैंक गारंटी दिनांक 30 अप्रैल 2020 तक प्रस्तुत करने का आवेदन करता है, तो (इस प्रतिबंध के अधीन की देय प्रतिभूति की 50 प्रतिशत अग्रिम ऑन लाईन जमा राशि, मुख्य राजस्व शीर्ष 0039 राज्य उत्पादन शुल्क में जमा करायी जाकर, उसका समायोजन माह मार्च 2021 में देय निर्धारित न्यूनतम प्रत्याभूत ड्यूटी

> के विरूद्ध आदेशित/मान्य किया जायेगा) आवेदक लायसेंसी के आवेदन को मान्य किया जायेगा।

In the event of the applicant/successful tenderer selected through lottery not presenting the remaining 50% of the security till 30th April, 2020, the approved licence will be cancelled and other arrangements will be made to operate the shops as required. The Clause 10.1.7 reads as under:-

> 10.1.7 लॉटरी द्वारा चयनित आवेदक/सफल टेण्डरदाता द्वारा दिनांक 30 अप्रैल 2020 तक प्रतिभूति की शेष 50 प्रतिशत राशि प्रस्तुत नहीं करने की स्थिति में, उसे स्वीकृत लायसेंस निरस्त किया जायेगा तथा आवश्यकतानुसार दुकानों के संचालन की अन्य व्यवस्था की जायेगी।''

Clause 10.1.9 of the policy states that if the complete bid amount and bank guarantee is not deposited, as required under Clause 9.4 and 10 of the Excise policy by the successful bidder, the amount deposited by the successful bidder shall be forfeited and liquor shops shall be re-auctioned and any difference in the bid amount shall be recovered from him as arrears of land revenue. The said clause is reproduced as under:-

> ''10.1.9 प्रतिभूति की सम्पूर्ण राशि विर्निदिष्ट अवधि में उपरोक्तानुसार जमा न करायी जाने की स्थिति में सफल ठेकेदार द्वारा जमा सम्पूर्ण राशि राजसात की जायेगी तथा उसके उत्तरदायित्व पर मदिरा दुकान के एकल समूह के पुनर्निष्पादन की नियमानुसार कार्यवाही की जायेगी एवं पुनर्निष्पादन के फलस्वरूप जो भी खिसारा आयेगा उसकी वसूली संबंधित से भू–राजस्व के बकाया की भांति की जायेगी।''

Clause 18.3 of the Excise policy relates to submission of an affidavit by the e-tenderer (Closed bid and auction) in prescribed format. Clause (7) of the said affidavit provides that in case the successful bidder fails to deposit the earnest money within three days from the date of execution or upto 31st March, 2020, whichever is earlier and the entire security deposit within the stipulated time, then the earnest money or any other amount so deposited for the contract period 2020-21 be forfeited and the allotted shop be put to public auction. After such auction, in case, the State suffers any loss due to getting offer of lesser amount than the reserve price, the licensee shall be liable to pay the difference, which shall be recoverable from him as an arrear of land revenue and for which he shall have no objection. It is as follows:-

> **''18.3 ई–टेण्डरदाता (क्लोज बिड एवं ऑक्शन) के लिए शपथ पत्र**
>
> देशी/विदेशी मदिरा की दुकानों के समूह/एकल समूहों के ई–टेण्डर (क्लोज बिड एवं ऑक्शन) प्रस्तुत करने पर आवेदक (व्यक्ति/फर्म/कम्पनी/

कन्सोर्टियम (Consortium)) द्वारा निम्नांकित प्रारूप में नोटराइज्ड शपथ पत्र अपलोड/प्रस्तुत करना आवश्यक होगा ।

शपथ–पत्र''

''(7) यदि मेरे द्वारा देय धरोहर राशि निष्पादन की तिथि से 03 दिवस के अंदर अथवा 31 मार्च, 2020 जो भी पहले हो, तक एवं सम्पूर्ण प्रतिभूति की राशि विनिर्दिष्ट अवधि में जमा नहीं की जाती है, तो मेरे द्वारा वर्ष 2020–21 के लिये जमा धरोहर राशि एवं अन्य कोई राशि राजसात कर ली जाए तथा मुझे आवंटित मदिरा दुकान के एकल समूह का वर्ष 2020–21 के लिए सार्वजनिक रूप से निष्पादन कर दिया जाए। इस निष्पादन के फलस्वरूप यदि शासन को आरक्षित मूल्य से कम राशि का ऑफर प्राप्त होता है, तो अन्तर की खिसारा राशि मेरे द्वारा देय होगी तथा यह राशि मुझसे भू–राजस्व की बकाया की भांति वसूली योग्य होगी । इसमे मुझे कोई आपत्ति नहीं होगी। ''

Clause 12 of the affidavit prescribed in Clause 18.3 of the Excise policy provides for an undertaking and having no objection by the tenderer of the liquor shop for cancellation of the licence by the Collector and forfeiture of the earnest money, security deposit, additional security deposit on account of false or incomplete declaration of any fact/particular/point in the documents submitted to the District Committee or on failure on his part to comply with any condition of auction. Similarly, the clause 13 of the said affidavit further creates an obligation on the tenderer to be bound by any necessary changes made by the State Government in the approved Excise provisions during the period of licence for the year 2020-21. Clause 12 and 13 of the said affidavit, read as under:-

''(12) देशी/विदेशी मदिरा की दुकानों के समूह/एकल समूहों के ई–टेण्डर (क्लोज बिड एवं ऑक्शन) द्वारा निष्पादन के लिए मेरे द्वारा जिला समिति को प्रस्तुत सहपत्रों में उल्लेखित समस्त तथ्य एवं विवरण, सत्य एवं पूर्ण है । उक्त उल्लेखित किसी तथ्य/विवरण/बिन्दु के असत्य अथवा अपूर्ण पाये जाने पर अथवा मदिरा दुकानों के निष्पादन संबंधी किसी शर्त का पालन न करने पर कलेक्टर को लायसेंस को निरस्त करने तथा मेरे द्वारा जमा कराई गयी धरोहर राशि, प्रतिभूति, अतिरिक्त प्रतिभूति की राशि को जप्त/राजसात करने का अधिकार होगा तथा इसके संबंध में मुझे किसी प्रकार की कोई आपत्ति नहीं होगी ।

(13) वर्ष 2020–21 के लिये स्वीकृत आबकारी व्यवस्था में लायसेंस अवधि के दौरान राज्य शासन यथा आवश्यक परिवर्तन कर सकेगा तथा वह मुझे मान्य होगा।''

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Clause 15.27(6) of the Excise Policy provides for acceptance of the bid and communication thereof to the successful bidder. The same is reproduced as under:-

(6) ....आबकारी आयुक्त द्वारा ऑफर स्वीकार किऐ जाने के निर्देश दिऐ जाने पर, कलेक्टर ई–टेण्डर की स्वीकृति की जानकारी देंगे। ....

Clause 20 of the Excise policy provides for compulsorily depositing post-dated cheques towards additional security deposit by the licensee of the liquor shop group/single groups within 10 days from the date of execution or upto 31st March, 2020, whichever is earlier. The said cheque may be sent to the Bank at any time during the year 2020-21 for realization of duty, if any, becomes due either partly or as a whole towards minimum bank guarantee of 20 days period or more. If the concerned licensee squares off the minimum bank guarantee duty provided for the year, the said cheques shall be returned to the licensee under acknowledgment. In case, the post-dated cheques are bounced, the licensee shall be liable to be proceeded with under Section 138 of the Negotiable Instruments Act, 1881. Likewise, the clause 21 of the said policy deals with execution of a counterpart agreement by the licensee of the liquor shop group/single groups in the prescribed format (on stamp paper of Rs.500/-) based on the annual value of the allotted liquor shops group/single groups. The licence for concerned liquor shop/shops shall be issued only after execution of counterpart agreement and completion of requisite formalities by the licensee. Clause 20 and 21 of the policy, read, thus:-

"20 अतिरिक्त प्रतिभूति राशि के पोस्ट डेटेड चैक जमा कराया जानाः–

वर्ष 2020–21 की ठेका अवधि हेतु नवीनीकरण/लॉटरी आवेदन पत्र/ई–टेण्डर (क्लोज बिड एवं ऑक्शन) द्वारा निष्पादित मदिरा दुकानों के समूह/एकल समूहों के लायसेंसी को उसकी मदिरा दुकानों के समूह/एकल समूहों के लिये निर्धारित वार्षिक न्यूनतक प्रत्याभूत ड्यूटी राशि के आधार पर, एक पक्ष के समानुपातिक न्यूनतम प्रत्याभूत ड्यूटी राशि के समतुल्य राशि के माह मई, 2020 से माह जनवरी, 2021 तक प्रत्येक पक्ष की पहली तिथि में वर्तमान में किसी भी राष्ट्रीयकृत/अनुसूचित/क्षेत्रीय ग्रामीण बैंक में संधारित बचत/चालू खाते से जारी अट्ठारह (18) पोस्ट डेटेड चैक जो संबंधित जिले के सहायक आबकारी आयुक्त/जिला आबकारी अधिकारी के पक्ष में जारी किये गये हों, अतिरिक्त प्रतिभूति के रूप में मदिरा दुकान के समूह/एकल समूहों के निष्पादन के दिनांक से 10 दिवस अथवा दिनांक 31 मार्च 2020, जो भी पहले हो, जमा करना अनिवार्य होगा। उपरोक्त चेकों को वर्ष 2020–21 में किसी भी समय, 20 दिवस से अधिक अवधि की न्यूनतम प्रत्याभूत ड्यूटी की पूर्ण अथवा आंशिक देयता लंबित होने पर बकाया ड्यूटी राशि की वसूली हेतु बैंक में भेजा जायेगा । यदि संबंधित लायसेंसी द्वारा वर्ष की देय सम्पूर्ण न्यूनतम प्रत्याभूत ड्यूटी राशि को चुका दिया जाता है तो, उपरोक्त पोस्टडेटेड चेकों को लायसेंसी से प्राप्ति रसीद लेकर, मूलतः वापस कर दिया जायेगा।

लायसेंसी इन पोस्ट डेटेड चेकों के संबंध में बैंक को कभी भी यह निर्देशित नहीं करेगा कि इन चेकों का भुगतान न किया जाये। इस संबंध में यह शपथ पत्र में

भी उल्लेख करेगा। पोस्टडेटेड चेक्स बाउंस (BOUNCE) होने पर लायसेंसी निगोशिएबल इंस्ट्रूमेंट एक्ट की धारा 138 के अन्तर्गत कार्यवाही योग्य होंगे।

21. प्रतिरूप करार प्रस्तुत किया जानाः—

वर्ष 2020—21 की ठेका अवधि के लिए नवीनीकरण/लॉटरी आवेदन पत्र/ई—टेण्डर (क्लोज बिड एवं ऑक्शन) अथवा अन्य किसी रीति द्वारा निष्पादित मदिरा दुकानों के समूह/एकल समूहों के लायसेंसी को उसकी, मदिरा दुकानों के समूह/एकल समूहों के वार्षिक मूल्य के आधार पर निर्धारित प्रारूप में (रूपये 500/— के स्टाम्प पेपर पर) प्रतिरूप करार करना होगा। प्रतिरूप करार निष्पादन एवं समस्त वांछित औपचारिकताओं की पूर्ति के उपरान्त ही उसे संबंधित मदिरा दुकान/दुकानों का लायसेंस जारी किया जायेगा।''

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Clause 44 of the Excise Policy prescribes that during the licence period if due to violation of licence conditions, non-depositing minimum bank guarantee or for any other reason, situation arises for cancellation of liquor shop group/single groups then the District Committee shall have power to re-auction the same through e-tender (closed bid and auction) which shall be done at the risk of the original licensee. Till such liquor shop group/single groups are re-auctioned, the same shall be operated by the department through its local officers/employees. In case of operation of liquor shop group/single groups in the contract period 2020-21, either through re-auction or department, whatever lesser amount is received after auction in comparison of its annual value, the same shall be recovered from the original licensee. The District Committee shall have the power to fix the final price of re-auction on the basis of the ground realities. The Clause 44 of the Excise Policy is reproduced as under:-

''44. लायसेंस अवधि के दौरान दुकान का पुर्ननिष्पादनः—

लायसेंस अवधि के दौरान लायसेंस शर्तों के उल्लंघन, निर्धारित न्यूनतम प्रत्याभूत ड्यूटी राशि जमा न करने अथवा किसी अन्य कारण से, यदि मदिरा दुकानों के समूह/एकल समूहों का लायसेंस निरस्त किए जाने की स्थिति बनती है तो ऐसी स्थिति में जिला समिति की उस मदिरा दुकानों के समूह/एकल समूहों को पुनः निष्पादित करने के अधिकार होंगे। मदिरा दुकानों के समूह/एकल समूहों की स्थिति में किसी एक मदिरा दुकान का लायसेंस निरस्त किये जाने की स्थिति निर्मित होने पर, उक्त मदिरा दुकानेां के समूह/एकल समूहों की सभी मदिरा दुकानों का लायसेंस निरस्त किया जायेगा । लायसेंस निरस्त किए जाने के पश्चात मूल अनुज्ञप्तिधारी के उत्तरदायित्व पर, उस मदिरा दुकानेां के समूह/एकल समूहों का पुनः निष्पादन ई—टेण्डर (क्लोज बिड एवं ऑक्शन) के माध्यम से किया जाएगा । मदिरा दुकानों के समूह/एकल समूहों का पुनः निष्पादन होने तक उसका विभागीय संचालन स्थानीय अधिकारियों/कर्मचारियों के माध्यम से किया जाएगा । ई—टेण्डर (क्लोज बिड एवं ऑक्शन) के माध्यम से मदिरा दुकानों के समूह/एकल समूहों के

पुनः निष्पादन अथवा विभागीय संचालन में, वर्ष 2020–21 की ठेका अवधि के लिए निष्पादन उपरान्त प्राप्त वार्षिक मूल्य की तुलना में, जो भी राशि कम प्राप्त होगी, यह मूल अनुज्ञप्तिधारी से वसूली योग्य होगी । पुनः निष्पादन किस मूल्य पर अंतिम किया जाए, इसके लिए जिला समिति को मैदानी वास्तविकताओं के आधार पर निर्णय लेने के अधिकार होंगे।''

Under Clause 48 of the policy if due to any policy decision of the Government or due to natural calamity, the licensee is not able to operate the allotted liquor shops, the licensee shall not be entitled for any compensation or rebate by the Government or Authorities. The said clause reads as under:-

''48. मद्य निषेध की नीति तथा प्राकृतिक विपत्तियों के फलस्वरूप दुकान बन्द करनाः—

राज्य में अथवा किसी पड़ोसी राज्य मे मद्य निषेध नीति के फलस्वरूप यदि कोई मदिरा दुकान/दुकानें बन्द की जाती हैं, तो इसके कारण लायसेंसी को शासन द्वारा कोई क्षति पूर्ति देय नहीं होगी । इसी प्रकार यदि पड़ोसी राज्य में मद्य निषेध के कारण अथवा किसी अन्य कारण से भी राज्य की किसी भी दुकान का पुनः निष्पादन करने का निर्णय लिया जाता है, तो ऐसा करने का अधिकार शासन को होगा तथा उस पर किसी लायसेंसी की आपत्ति मान्य नहीं की जायेगी और किसी प्रकार की क्षतिपूर्ति अथवा छूट किसी भी आपत्तिकर्ता को देय नहीं होगी । यदि लायसेंस की अवधि में लायसेंसी को किसी दैवीय प्रकोप या प्राकृतिक आपदा के फलस्वरूप किसी प्रकार की क्षति होती है, तो लायसेंसी को किसी तरह की क्षतिपूर्ति की पात्रता नहीं होगी।''

Clause 49 of the policy lays down that if during the licence period consequent upon any social, political presentations or law and order situations, the licensee of a particular area is unable to take the supply of liquor equivalent to minimum bank guarantee duty fixed for the licence year, in such circumstances of loss of sale of liquor, the concerned licensee shall be entitled to compensation in equal proportion of minimum bank guarantee duty after taking into account all the situations. Such decision to compensation or grant rebate in duty payable shall be taken by the State/Excise Commissioner on the basis of the reasonable and factual proposal sent by the District Committee. It is as under:-

49 सामाजिक, राजनैतिक प्रदर्शनों, कानून व्यवस्था संबंधी कारणों के फलस्वरूप न्यूनतम प्रत्याभूत ड्यूटी में क्षतिपूर्ति स्वीकृत किया जानाः—

लायसेंस अवधि में सामाजिक, राजनैतिक प्रदर्शनों, कानून व्यवस्था संबंधी कारणों के फलस्वरूप किसी क्षेत्र विशेष की मदिरा दुकानें बन्द किये जाने के आदेश के कारण, यदि संबंधित लायसेंसी वर्ष के लिये देय वार्षिक निर्धारित न्यूनतम प्रत्याभूत ड्यूटी के समतुल्य मदिरा का प्रदाय नहीं ले पाता है, तो ऐसी स्थिति में उसको मदिरा विक्रय की ऐसी हानि के संदर्भ में, समस्त स्थितियों का आंकलन कर समानुपातिक न्यूनतम प्रत्याभूत ड्यूटी राशि की क्षतिपूर्ति का पात्र माना जा सकेगा।

इस हेतु संबंधित जिले की जिला समिति द्वारा भेजे गये युक्तियुक्त एवं तथ्यात्मक प्रस्ताव पर राज्य शासन/आबकारी आयुक्त द्वारा समानुपातिक न्यूनतम प्रत्याभूत ड्यूटी की क्षतिपूर्ति अथवा देय राशि से छूट दिये जाने का निर्णय लिया जा सकेगा।''

39. The petitioners have further relied upon Clause 54 of the Excise Policy, which provides that in case of unavoidable circumstances, by considering the justification, the State Government shall have power to either wholly or partially cancel the auction process conducted for liquor shop group/single groups in a District or all the Districts and by refunding the amount so deposited in compliance of the process fee/conditions, may make an arrangement/re-arrangement for retail sale of country/foreign liquor by adopting any process/mode. In such event, no compensation shall be payable. The said clause reads as under:-

> ''54. राज्य शासन को यह अधिकार होगा कि अपरिहार्य स्थिति में, औचित्य को समझते हुये किसी भी जिले में या समस्त जिलों की मदिरा दुकानों के समूह/एकल समूहों के निष्पादन की प्रक्रिया को सम्पूर्ण/आंशिक रूप से समाप्त करते हुए, प्रोसेस फीस/शर्तों के पालन में जमा राशि को वापिस कर किसी भी अन्य प्रक्रिया/व्यवस्था से देशी/विदेशी मदिरा की फुटकर बिक्री की दुकानों के व्यवस्थापन/पुनःव्यवस्थापन की कार्यवाही की जा सकेगी। ऐसी स्थिति में कोई भी क्षतिपूर्ति देय नहीं होगी ''

40. Learned counsel for the respondents-State had also invited our attention to Clause 10 of the Foreign Liquor Licence issued under M.P. Foreign Liquor Rules, 1996 and Clause 15 of the Country Spirit Licence issued under M.P. Country Spirit Rules, 1995, which according to them, binds the licensees with the compliance of general licence conditions. The same are also relevant to be reproduced, which read, thus:-

''प्रारूप एफ.एल.–1

<u>विदेशी मदिरा के फुटकर विक्रय हेतु अनुज्ञप्ति</u>

विदेशी मदिरा नियम, 1996 के नियम 8 के उपनियम (1) के खण्ड (क) के अधीन और वार्षिक मूल्य रूपये 15,49,72,725 के प्रतिफल में मेसर्स सुन्दरम ट्रेडर्स पार्टनर श्री उज्जवल चौहान, संतोषी माता वार्ड पाण्डुर्णा, जिला छिन्दवाड़ा (म.प्र.) की वेदेशी मदिरा के फुटकर विक्रय करने के लिये छिन्दवाड़ा जिले के छिन्दवाड़ा नगर में फव्वारा चौक मार्ग पर स्थित अनुज्ञप्त परिसर में 01.04.2020 से 31.03. 2021 तक एतदद्वारा निम्नलिखित शर्तो के अधीन रहते हुये यह अनुज्ञप्ति स्वीकृत की जाती हैः–

<u>शर्तें</u>

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<u>(10) अनुज्ञप्तिधारक, शर्त दो–क और तेरह के सिवाय अनुज्ञप्ति की सामान्य शर्तों से आबद्ध रहेगा।</u>

सही/–

दिनांक 04 मई, 2020 सहायक आबकारी आयुक्त

''प्रारूप सी.एस.–2

<u>सीलबंद बोतलों में देशी स्पिरिट के फुटकर विक्रय के लिये लायसेंस</u>

देशी स्पिरिट नियम, 1995 के नियम 9 के अधीन तथा रूपये 4,90,65,240 फीस के प्रतिफल में एतदद्वारा मेसर्स सुन्दरम ट्रेडर्स पार्टनर श्री उज्जवल चौहान, संतोषी माता वार्ड पाण्डुर्णा, जिला छिन्दवाड़ा (म.प्र.) को नीचे दी गई अनुसूची 1 में दिये गये वर्णन के अनुसार बुधवारी स्थित दुकान पर तारीख 01.04.2020 से 31.03. 2021 तक के लिये निम्नलिखित शर्तो के अध्यधीन रहते हुये देशी स्पिरिट फुटकर विक्रय हेतु एतदद्वारा यह अनुज्ञप्ति मंजूर की जाती हैः–

<u>शर्तें</u>

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<u>(15) अनुज्ञप्तिधारी, इस अनुज्ञप्ति की सामान्य शर्तों (शर्त दो–क एवं तेरह को छोडकर) विशेष पास नियम और इस अनुज्ञप्ति के मंजूर होने के पूर्व उसे सूचित की गयी, किन्हीं विशेष शर्तों से आबद्ध होगा।</u>

सही / –

दिनांक 04 मई, 2020 सहायक आबकारी आयुक्त''

41. The State enjoys exclusive privileges with regard to liquor trade, as the Seventh Schedule under Article 246 of the Constitution of India in Entry 8 of List-II provides for "production, manufacture, possession, transport, purchase and sale of intoxicating liquors" as a State subject. The liquor trade in the State of M.P. is governed by Excise Act, which regulates the Excise policy and confers the powers and authority with the Excise Department. Learned counsel for the petitioners have laid much emphasis on Section 17 and 18 under Chapter IV and Section 28 and 29 under Chapter VI of the Excise Act. Section 17 of the said Act provides that there shall be no sale of intoxicant without the licence granted in that behalf whereas Section 18 deals with the power of the State Government to grant lease of right to manufacture, etc. Section 28 of the Act prescribes the form and conditions of licence etc. and under Section 29 thereof, the power to take security from licensee and execution of counterpart agreement in conformity with the tenure of licence has been spelt out. The relevant provisions of the Excise Act read, thus:-

"**17. Licence required for sale of intoxicant.**— (1) No intoxicant shall be sold except under the authority and subject to the terms and conditions of licence granted in that behalf:

Provided that—

(a) a person having the right to the tari drawn from any tree may sell such tari without a licence to a person licensed to manufacture or sell tari under this Act;

(b) a person under Sec. 13 to cultivate the hemp plant may sell without a licence those portions of the plant from which the intoxicating drug is manufactured or produced to any person licensed under this

Act to deal in the same, or to any officer whom the Excise Commissioner may prescribe; and

(c) nothing in this section shall apply to the sale of any foreign liquor lawfully procured by any person for his private use and sold by him or on his behalf or on behalf of his representatives interest upon his quitting a station or after his decease.

(2) On such conditions as the Excise Commissioner may determine, a licence for sale under the Excise Law for the time being in force in other States or Union territories may be deemed to be licence granted in that behalf under this Act.

18. Power to grant lease of right to manufacture, **etc**.— (1) The State Government may lease to any person, on such conditions and for such period as it may think fit, the right—

(a) of manufacturing, or of supplying by wholesale or of both; or

(b) of selling by wholesale or by retail; or

(c) of manufacturing or of supplying by wholesale, or of both, and selling by retail;

any liquor or intoxicating within any specified area.

(2) The licensing authority may grant to a lessee under sub-section (1) a licence in the terms of his lease; and when there is no condition in the lease which prohibits sub-letting, may, on the application of the lessee, grant a licence to any sub-lessee approved by such authority."

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28. Form and conditions of licence etc.— (1) Every permit or pass issued or licence granted under this Act shall be issued or granted on payment of such fees, for such period, subject to such restrictions and conditions and shall be in such form and contain such particulars as may be prescribed.

(2) The conditions prescribed under sub-section (1) may require, inter alia, the licensee to lift for sale, the minimum quantity of country spirit or Indian-made liquor, fixed for his shop and to pay the penalty at the prescribed rate on the quantity of liquor short lifted.

(3) Penalty at the prescribed rate on infraction or infringement of any conditions laid down in sub-section (1) of specifically enumerated in sub-section (2) shall be leviable on and recoverable from the licensee.

29. Power to take security from licensee. - Any authority granting a licence under this Act may require the licensee to execute a counterpart agreement in conformity with the tenure of his licence and to give such security for the performance of such agreement, or to make such deposit or to provide both as such authority may think fit."

42. On the other hand, learned counsel for the respondents-State have taken us through Section 62 of the Excise Act, which empowers the State Government to make rules and in accordance with which, the State Government framed the General License Conditions governing the terms and

conditions of the licence granted to the petitioners. Section 62 of the said Act reads as follows:-

> “**62. Power to make rules.** — (1) The State Government may make rules for the purpose of carrying out the provisions of this Act.
>
> (2) In particular, and without prejudice to the generality of the foregoing provision, the State Government may make rules—
>
> (a) prescribing the powers and duties of Excise Officers;
>
> (b) regulating the delegation of any powers or duties by the Chief Revenue Authority, the Excise Commissioner or Collectors under Section 7, clause (g);
>
> (c) declaring in what cases or classes of cases and to what authorities appeal shall lie from orders, whether original or appellate, passed under this Act or under any rule made thereunder, or by what authorities such orders may be revised, and prescribing the time and manner of presenting, and the procedure for dealing with appeals and revisions;
>
> (d) regulating the import, export, transport, manufacture, collection, possession, supply or storage of any intoxicant, or the cultivation of the hemp plant and may, by such rules among other matters—
>
> (i) regulate the tapping of tari-producing trees, the drawing of tan from such trees. the marking of the same and the maintenance of such marks;
>
> (ii) declare the process by which spirit shall be denatured and the denaturisation of spirit ascertained; and
>
> (iii) cause spirit to be denatured through the agency or under the supervision of its own officers;
>
> (d-l) regulating the import, export, transport, collection, possession, supply, storage or sale of Mahua flowers prescribing licences and permit therefor, throughout the State or in any specified areas or for any specified period;
>
> (e) regulating the periods and localities for which, and the persons or classes of persons to whom, licences for the wholesale or retail vend of any intoxicant may be granted, and regulating the number of such licences which may be granted in any local area;
>
> (f) prescribing the procedure to be followed and the matters to be ascertained before any licence for such vend is granted for any locality;
>
> (g) regulation the amount, time, place and manner of payment of any duty or fee or tax or penalty;
>
> (h) prescribing the authority by, the form in which, and terms and conditions on and subject to which any licence, permit or pass shall he granted, any by such rules, among other matters,—
>
> (i) fix the period for which any licence, permit or pass shall continue in force;
>
> (ii) prescribe the scale of fees or the manner of fixing the fees payable in respect of any such licence, permit or pass;
>
> (iii) prescribe the amount of security to be deposited by holders of any licence, permit or pass for the performance of the conditions of the same;

(iv) prescribe the accounts to be maintained and the returns to be submitted by licence-holders; and

(v) prohibit or regulate the partnership in, or the transfer of, licenses;

(i) prescribing the measures for ascertaining local public opinion and prescribing the powers of District Planning Committee constituted under sub-section (1) of Section 3 of the Madhya Pradesh Zila Yojana Samiti Adhiniyam, 1995 (No. 19 of 1995) in respect of advising about opening, closing or shifting of any retail intoxicant shop;

(j) providing for the destruction or other disposal of any intoxicant deemed to be unfit for use;

(k) regulating the disposal of confiscated articles;

(l) regulating the grant of expenses to witnesses and of compensation to persons charged with offences under this Act and subsequently released, discharged or acquitted; and

(m) regulating the power of Excise Officers to summon witnesses from a distance;

(n) regulating the payment of rewards to officers, informers and other persons out of the proceeds of fines and confiscations under this Act.

(3) The power conferred by this section of making rules is subject to the condition that the rules made under sub-section (2) (a), (b), (c), (e), (f), (i), (1) and (m) shall he made after previous publication:

Provided that any such rules may be made without previous publication if the State Government considers that they should be brought into force at one."

43. Our attention was also invited to Rule XXXIII of the General Licence Conditions, which authorises the State Government to amend any condition of licence during the currency of the licence which shall be effective from the commencement of the licence if not otherwise directed and the licensee shall be bound by the same and shall not be entitled to claim any damages on account of any such amendment. Rule XXXIII thereof, reads as under:-

"**XXXIII. Power to amend conditions of Licence**. - the State Government are authorised to amend any condition of license during the currency of the licence and, unless otherwise directed, such amendment, shall be effective as from the commencement of the licence and licensee shall be bound by the same and shall not be entitled to any damages on account of any such amendment."

44. By Notification No.14-V-SR dated 07.01.1960, the State Government in exercise of the powers conferred by Section 62 of the Excise Act has framed the Rules. These Rules are called as Rules of General Application. Clause III of the said Rules, provides for debarment of certain persons from bidding, which reads as under:-

> "**III. Certain persons debarred from bidding.** - When licences are put to auction the following provisions shall apply:
>
> (1) Former licences who owe arrears of excise revenue to Government, or whose conduct as licensee has been unsatisfactory, or who have been guilty of serious breaches of their licences under the Madhya Pradesh Excise Act, 1915, the Madhya Pradesh Prohibition Act, 1938, the Dangerous Drugs Act, 1930, or the Opium Act, 1878, or the rules made thereunder, and persons who have been convicted by a criminal court, of such offences, as in the opinion of the officer holding the auction, render them undesirable holders of licences, and persons believed to be of bad character shall not be entitled to bid at the auction without the consent of the Collector or District Excise Officer or the officer holding the auction.
>
> *** *** ***
>
> (5) An aggrieved person may appeal to the Excise Commissioner or any officer authorised in this behalf: provided that the time limit allowed for presenting an appeal shall not exceed five days from the date of conclusion of the auction."

45. Section 62 of the National Disaster Management Act, 2005 was cited by the learned counsel for the respondents-State to contend that to facilitate and assist the State Governments in the disaster management, the Central Government can issue necessary direction to the State Governments, and the State Governments shall be bound to comply with the same. Section 62 of the Act of 2005, reads as under:-

> "**62. Power to issue direction by Central Government.**— Notwithstanding anything contained in any other law for the time being in force, it shall be lawful for the Central Government to issue direction in writing to the Ministries or Departments of the Government of India, or the National Executive Committee or the State Government, State Authority, State Executive Committee, statutory bodies or any of its officers or employees, as the case may be, to facilitate or assist in the disaster management and such Ministry or Department or Government or Authority, Executive Committee, statutory body, officer or employee shall be bound to comply with such direction."

46. The learned senior counsel for the petitioners had put forward that apart from the Excise Policy dated 25.02.2020 and amended policy dated 23.05.2020, which were published in the official Gazette of M.P., none of the action taken for change of timings for operation of the shops, period of licence i.e. extending the period by two months i.e. upto 31.05.2020, restricting the operation of *Ahatas* and changing the Maximum Retail Price of the liquor and so on has been notified in the official Gazette and the said action has been taken by the Excise Officers in arbitrary manner and therefore, this action of the respondents is *de hors* the provisions of Section 63 of the Excise Act, which reads as under:-

> "**63. Publication of rules and notifications**. - All rules made and notifications issued under this Act shall be published in the Official Gazette, and shall have effect from the date of such publication or from such other date as may be specified in that behalf."

47. Section 56 of the Contract Act was taken shelter of by the learned counsel for the petitioners to urge that since the contract between the parties stood frustrated due to subsequent events of lockdown and in the aftermath of Covid-19 pandemic and has rendered impossible to perform, therefore, the petitioners are entitled to refund of the money deposited by them by quashing the entire auction proceedings. It is useful to reproduce the said statutory provision for the purposes of the question involved in the case. The same reads as under:-

> "**56. Agreement to do impossible Act**. - An agreement to do an act impossible in itself is void.
>
> **Contract to do act afterwards becoming impossible or unlawful**. - A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
>
> **Compensation for loss through non-performance of act known to be impossible or unlawful**.- Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

48. Having analysed the legal provisions, we now deal with the submissions arising for consideration in this case, as noticed above.

49. The question No.(i): whether there is concluded contract between the parties and question No.(ii): whether the State is correct in unilaterally issuing the licences with changed terms and conditions, are taken up together as they are overlapping and are based on mixed questions of fact and law.

50. The main contention of the petitioners was that their status was not of a licensee, therefore, there was no concluded contract and even the subsequent Notification dated 23.05.2020 amending the Excise policy 2020-21 is also not valid and legal.

51. Adverting to the first question, certain pleadings in the writ petition may be appreciated. Firstly, the petitioners in para 5.15 of their writ petition

by referring to certain letters issued by the Assistant Excise Commissioner of the concerned District (by the order of District Committee) and the letters of the Collector (Excise) of the concerned Districts dated 09.03.2020, 11.03.2020, 16.03.2020, 17.03.2020 and 22.03.2020 which are contained in Annexure P-2, have themselves admitted that after due evaluation of their bids, the petitioners being the highest bidders were communicated the acceptance of their offers by the respondents for the respective liquor vends/groups in pursuance of Excise Policy 2020-21. Secondly, in para 5.17, the petitioners have further admitted that the process of completing the auction and declaring the petitioners as successful bidders stood concluded in the first week of March, 2020 for most of the districts and shops in the State. Thirdly, in relief clause 7(v) also, there is an admission by the petitioners regarding acceptance made by the State Government of their offer inasmuch as the petitioners have prayed for issue of a writ of certiorari thereby quashing the offers made by them and acceptance thereof by the respondents. Lastly, even from the arguments advanced by the learned counsel for the petitioners it is evinced that the bids of the petitioners were accepted and acceptance thereof was communicated to the petitioners. The relevant paragraphs of the writ petition are reproduced as under:-

> "5.15 It is submitted that on the basis of the conditions detailed in the excise policy and the conditions prevailing at the relevant point of time the petitioners herein had submitted their respective bids and after due evaluation being the highest bidders the petitioners were declared as the successful bidders for their respective shops/groups. Copy of the documents to show that the petitioners have been declared as successful bidders are cumulatively filed herewith and marked as Annexure P/2.
>
> *** *** ***
>
> 5.17 It is pertinent to mention here that the process of completing the auction and declaring the petitioners as successful bidders stood concluded in the first week of March for most of the districts and shops in the State.
>
> *** *** ***
>
> 7. Relief prayed for:
>
> *** *** ***
>
> (v) To issue a writ of certiorari thereby quashing and setting aside the offers made by the petitioners and the acceptance thereof by the respondent state government."

52. Section 2(b) of the Contract Act provides that when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted and after such acceptance of the proposal, it becomes a promise. Whereas, Section 5 of the Contract Act envisages that a proposal may be revoked at any time before communication of its acceptance is complete as against the proposer, but not afterwards. Likewise, an acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards. Thus, although an offer does not create any legal obligation but after communication of its acceptance is complete and the offer has turned into a promise, it becomes irrevocable. In other words, an offer could be revoked before communication of its acceptance is complete because no legally enforceable right is created till then but after the communication of acceptance of offer is complete, it becomes irrevocable and creates a right between the parties and the same cannot be revoked. It would be apt to reproduce Sections 2(b) and 5 of the Contract Act, which read, thus:

> "**2. Interpretation-clause**. – In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:-
>
> *** *** ***
>
> (b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;
>
> *** *** ***
>
> **5. Revocation of Proposals and acceptance**. – A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.
>
> An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards."

53. In the present case, till 16th March or 22nd March, 2020, as the dates of acceptance of the offer by the respondents are different, when acceptance of the offer was communicated to the petitioners vide letters Annexure P-2, there was no withdrawal of the offer by the petitioners nor was there anything that since the petitioners have lost or are going to lose the actual bargain what they had expected while making the offer, therefore, the auction process has to be revalued or they want to withdraw. A representation dated 27.04.2020 (Annexure P-8) has been placed on record wherein the petitioner No.18 –

Alcoactive Retail Traders Pvt. Ltd., for the first time, appears to have raised a grievance before the Authorities (although no acknowledgment or receipt thereof is on record) that though the chances are very bleak but even if the liquor shops are allowed to open after the lockdown is lifted on 04.05.2020, it will not give the same revenue as the bidders had calculated at the time of submitting their bids because the customers will hesitate to purchase liquor due to fear and psychological effect of deadly disease. Thereafter, the petitioners have preferred this writ petition on 2nd May, 2020 but all this was done much after the acceptance of the offer was communicated to the petitioners. Thus, after acceptance of the offer made by the petitioners either through e-auction or renewal/lottery, the contract between the parties, stood concluded.

54. In view of the specific admission made by the petitioners with regard to acceptance of their offer, which culminates into a binding contract, the contentions of the learned senior counsel for the petitioners that documentation and payment taken together in terms of Clause 9 and 10 of the policy shall alone constitute entitlement for licence and further that since the mandatory conditions of the Excise Policy 2020-21 such as issue of licence upto 01.04.2020; security deposit in the form of bank guarantee in terms of Clause 10 and post-dated cheques towards additional security deposit as per Clause 20 of the policy to be submitted before 31.03.2020, were not completed owing to lockdown declared on 24.03.2020; therefore, the contract is not concluded, would be of no great significance. As observed earlier, to have an enforceable contract, there must be an offer and an unconditional and definite acceptance thereof. Even a provisional acceptance cannot itself make a binding contract. If there is a qualified or conditional acceptance of the offer by the offeree, the power of acceptance of the offeree is terminated. The power of acceptance of the offeree can also be terminated if the offeree, instead of accepting the offer, makes a counteroffer. The counteroffer is a new offer by the offeree that varies the terms of the original offer. If the offeree makes a new offer, the original offer is terminated. Similarly, a conditional or qualified/partial acceptance is an acceptance which changes the original terms of an offer and operates as a counteroffer.

55. Lord Roche in **Nazir Ahmad**'s case **(supra),** following the rule laid down in *Taylor vs. Taylor [(1875) 1 Ch D 426]* that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all, stated as under:-

> "Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all."

56. The principle recognised in **Nazir Ahmad**'s case **(supra**), which was relied upon by the learned senior counsel for the petitioners, is also not in conflict. However, in the present case, the acceptance of the offer communicated to the petitioners vide Annexure P-2 is neither a provisional acceptance nor a conditional or qualified acceptance. Inasmuch as, by the said acceptance of the offer, no new offer has been made to the petitioners so as to alter the original offer or render the original offer as the provisional one. It may be noted that all the petitioners have admitted that after acceptance of the offer made by them, remaining 4% amount of total earnest money of 5% in terms of clause 9.4 of the Excise Policy was deposited by them on 20.03.2020 i.e. before 31.03.2020. This fact is also corroborated by the chart filed by the respondents with their return, which is also reproduced above in paragraph No.12 wherein it is mentioned that the said pre-condition of depositing remaining amount of earnest money was already fulfilled by the petitioners.

57. Now the other conditions of issue of licence such as security deposit in the form of bank guarantee on non-judicial stamp-paper under Clause 10, post-dated cheques towards additional security deposit as per Clause 20, counterpart agreement under Clause 21 of the Excise Policy in terms of Section 29 of the Excise Act which provides for execution of counterpart agreement and to give such security for the performance of such agreement or to make such deposit or to provide both under Section 29 of the Excise Act etc., the mention of which has also been made in the acceptance letter, cannot be treated to be a counteroffer or conditional or qualified acceptance so as to terminate the offeree's power of acceptance. These are the pre-conditions for issue of licence after the offer has already been accepted and the contract has been concluded. Still further, the aforementioned chart (Annexure R-2) also indicates that out of those 30 petitioners having 40 groups who completely

deposited the earnest money as per clause 9.4 of the policy, as many as 18 groups had completed all the remaining conditions of Clauses 10 and 20 of the Policy either before 31.03.2020 or before the date of filing of the writ petition. As further shown in the said chart, 07 groups have also deposited bank guarantee but not deposited post-dated cheques; only 14 groups have not deposited both, the bank guarantee and post-dated cheques; whereas for one – Raisen Marketing, no data appears to be available. Ultimately, all the petitioners have retracted. Thus, it cannot be held that only the auction process was complete and the contract was not concluded.

58. We find force in the argument advanced by the learned senior counsel for the respondents that the remaining conditions prescribed for issue of licences such as making of security deposit in the form of Bank guarantee in terms of Clause 10 to be deposited within 10 days of the offer or before 31.03.2020 as per clause 10.1.3 and 10.1.4, deposit of post-dated cheques towards additional security deposit as per clause 20 and submission of counterpart agreement in view of clause 21 of the Excise Policy 2020-21 would operate post concluded contract. Such conditions attached to issue of licence are only ministerial formalities, which are to be complied with after the bid has been accepted. The respondents have shown by their conduct, such formalities can be relaxed or modified to an extent by the offeree-respondents in the given facts and circumstances. However, the petitioners cannot withdraw or revoke the contract on the pretext that since no licence was issued by the respondents prior to or on the date of commencement of the licence period i.e. 01.04.2020 or that the licence was issued without complying with the conditions stipulated in the Excise Policy or the Excise Act, therefore, the contract has not concluded or the same is not binding on the petitioners. It has come on record that those essential requirements have been complied with and mandatory payments required to be made under the Excise Policy and in terms of the acceptance letters contained in Annexure P-2 have been made by many of the petitioners during the lockdown period only.

59. It was contended on behalf of the petitioners that the words "may require" occurring in Sub-section (2) of Section 28 of the Excise Act are to be read as "shall require" as the said provision envisages penalty in case of minimum quantity of liquor is short lifted, therefore, the conditions for issue of licences are mandatory. The said provision reads that "*the conditions prescribed under sub-section (1) may require, inter alia, the licensee to lift for sale, the minimum quantity of country spirit or Indian-made liquor, fixed for his shop and to pay the penalty at the prescribed rate on the quantity of liquor short lifted*. Upon reading of the said provision, it can be inferred that the words "may require" occurring therein operates not only for short lifting of quantity but it applies to the penalty as well and does not take away the right of the parties to meet the said condition if it occurs during the course of the business. It is a trite law that the provision has to be read as a whole and not in isolation. When the language is unambiguous, clear and plain, the Court should construe it in the ordinary sense and give effect to it irrespective of consequences and the consideration of hardship and inconvenience should be avoided. Reference is made to the law laid down by the Supreme Court in **Mohan Kumar Singhania and others vs. Union of India and others, AIR 1992 SC 1** and **Anwar Hasan Khan vs. Mohammad Shafi and others, (2001) 8 SCC 540**. The same analogy applies to Section 29 of the Excise Act whereby the successful bidder is required to execute a counterpart agreement. These conditions operate post the concluded contract and therefore, do not confer any advantage to the petitioners to urge that there is violation of the mandatory conditions envisaged under Sections 28 and 29 of the Excise Act regarding the issue of licences and therefore, the contract is not concluded.

60. We also see no reason to reject the argument of the learned senior counsel for the respondents that since the signed affidavit in terms of clause 18.3 of the policy was already uploaded along with the bid and the State Government having accepted the bid of the petitioners on that basis, merely because affidavit in original was not submitted the petitioners would not be bound by clause 18.3 of the statutory policy. A perusal of clause 18.3 clearly reveals that affidavit is to be uploaded/submitted with the bid. Thus, there remains no doubt that option was available with the bidder to upload the

signed affidavit. It is also a fact that out of total 380 groups of liquor vends, as many as 323 groups are continuing with the contract as they have either not approached this Court or have filed an affidavit of their willingness to continue with the contract and only 57 groups have decided to abandon the contract or surrender the licences issued to them. It makes it clear that when the acceptance of the offer was communicated to the petitioners and they were asked to complete the remaining conditions/formalities, the State still could have issued the licences but the petitioners could not have claimed so and they were liable to fulfill the same or face the consequences of non-compliance. In this view of the matter, once the requirement which is said to be essential or mandatory, was relaxed by the respondents and those requirements operate the post concluded contract, the principle laid down in **Nazir Ahmad**'s case (**supra**) would not help the petitioners. For the same reasons, the argument of learned senior counsel for the petitioners that the licences are not valid and therefore, the status of the petitioners is not as that of a licensee, as the same were issued contrary to the Statute; without completing the pre-conditions of issue of licences; unilaterally sent through email instead of providing the same physically; not issued on a particular form; non-execution of counterpart agreement and payment of security for the performance, is also stated to be rejected. Otherwise also, even if the status of the petitioners as on the date of commencement of the licence may not have been as that of a licensee but the acceptance of the offer of the petitioners, which was communicated to them vide Annexure P-2, had the effect of binding them to the contract. As such, being the offeror, it is not open to the petitioners to withdraw the offer and it is also not reasonable to force the offeree to accept a changed or modified performance of the contract.

61. Thus, it is held that in the present case, the contract between the parties is a concluded contract. Once the offer is accepted on the terms and conditions as mentioned therein, a completed contract comes into existence and the offeror cannot be permitted to wriggle out of the contractual obligations arising out of the acceptance of his bid by a petition under Article 226 of the Constitution. In this context, the regard can be had to the judgments of the Supreme Court in **Har Shankar v. The Dy. Excise and**

Taxation Commissioner and others, (1975) 1 SCC 737, **Lal Chand**'s case **(supra)** and **Ghaziabad Development Authority**'s case (**supra**).

62. In **Har Shankar**'s case **(supra)**, the Supreme Court held that one of the important purposes of selling the exclusive right to vend liquor in wholesale or retail is to raise revenue. The licence fee was a price for acquiring such privilege. One who makes a bid for the grant of such privilege with a full knowledge of the terms and conditions attaching to the auction cannot be permitted to wriggle out of contractual obligations arising out of the acceptance of his bid. It was further held that the jurisdiction of the High Courts under Article 226 was not intended to facilitate avoidance of obligations voluntarily incurred. The relevant extract of the judgment is reproduced as under:-

> "16…………The announcement of conditions governing the auctions were in the nature of an invitation to an offer to those who were interested in the sale of country liquor. The bids given in the auctions were offers made by prospective vendors to the Government. The Government's acceptance of those bids was the acceptance of willing offers made to it. On such acceptance, the contract between the bidders and the Government became concluded and a binding agreement came into existence between them…….. The successful bidders were then granted licences evidencing the terms of contract between them and the Government, under which they became entitled to sell liquor. The licensees exploited the respective licences for a portion of the period of their currency, presumably in expectation of a profit. Commercial considerations may have revealed an error of judgment in the initial assessment of profitability of the adventure but that is a normal incident of all trading transactions. Those who contract with open eyes must accept the burdens of the contract along with its benefits. The powers of the Financial Commissioner to grant liquor licensees by auction and to collect licence fees through the medium of auctions cannot by writ petitions be questioned by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force."

63. The aforesaid view has been reiterated in **Lal Chand**'s case **(supra)** wherein, while dealing with the issue of demand for recovery of the difference between amount from the successful bidder due to reauction of the liquor vend on his failure to pay the security amount and also the defaulted installments of the licence fee payable under the Punjab Excise Act, 1914 and the Rules made thereunder, the Court referred to the judgments in **Har Shankar**, **Jage Ram** and **Dial Chand Gian Chand**'s cases **(supra)** and

observed that under the Punjab Excise Act, 1914 and some other State Excise Acts whereunder once the bid offered by a person at an auction-sale is accepted by the authority competent, a completed contract comes into existence and all that is required is the grant of a licence to the person whose bid has been accepted. The relevant extract of the judgment in **Lal Chand**'s case **(supra)** is as under:-

> "8. In *Har Shankar v. Deputy Excise & Taxation Commissioner & Ors. [(1975) 1 SCC 737*], this Court held that the writ jurisdiction of the High Courts under Article 226 was not intended to facilitate avoidance of obligations voluntarily incurred. It was observed that one of the important purpose of selling the exclusive right to vend liquor in wholesale or retail is to raise revenue. The licence fee was a price for acquiring such privilege. One who makes a bid for the grant of such privilege with a full knowledge of the terms and conditions attaching to the auction cannot be permitted to wriggle out of the contractual obligations arising out of the acceptance of his bid. Chandrachud, J. (as he then was interpreting the provisions of the Punjab Excise Act, 1914 and of the Punjab Liquor Licence Rules, 1956 said: (SCC pp. 745-46, para 16)
>
> *** *** ***
>
> To the same effect are the decisions of this Court in *State of Haryana v. Jage Ram* and the *State of Punjab v. M/s Dial Chand Gian Chand & Co. (1983) 2 SCC 503* laying down that persons who offer their bids at an auction to vend country liquor with full knowledge of the terms and conditions attaching thereto, cannot be permitted to wriggle out of the contractual obligations arising out of the acceptance of their bids by a petition under Art. 226 of the Constitution.
>
> *** *** ***
>
> 11. ……. In respect of forest contracts which were dealt with by this Court in *K.P. Chowdhary v. State of M.P., AIR 1967 SC 203, Mulamchand v. State of M.P. AIR 1968 SC 1218, State of M.P. v. Rattan Lal, 1967 MPLJ 104, and State of M.P. v. Firm Gobardhan Dass Kailash Nath, (1973) 1 SCC 668 cases*, there are provisions in the Indian Forest Act, 1927 and the Forest Contract Rules framed thereunder for entering into a formal deed between the forest contractor and the State Government to be executed and expressed in the name of the Governor in conformity with the requirements of Article 299(1), whereas under the Punjab Excise Act, 1914, like some other State Excise Acts, once the bid offered by a person at an auction sale is accepted by the authority competent, a completed contract comes into existence and all that is required is the grant of a licence to the person whose bid has been accepted. ……..
>
> (emphasis supplied)

64. The Supreme Court in **Ghaziabad Development Authority**'s case **(supra)**, has also noted that once the offer is accepted on the terms and

conditions as mentioned therein, the contract stands concluded between the parties. In taking that view, the Court recorded thus:-

> "5. When a Development Authority announces a scheme for allotment of plots, the brochure issued by it for public information is an invitation to offer. Several members of the public may make applications for availing benefit of the scheme. Such applications are offers. Some of the offers having been accepted subject to rules of priority or preference laid down by the Authority result in a contract between the applicant and the Authority. The legal relationship governing the performance and consequences flowing from breach would be worked out under the provisions of the Contract Act and the Specific Relief Act except to the extent governed by the law applicable to the Authority floating the scheme……."

65. Considering the alternative submission of the petitioners that since the contract between the parties is not in the name of the Governor, therefore, the same is not enforceable against either of the parties. There is no dispute with regard to the proposition that a contract which has to be executed in accordance with Article 299(1) of the Constitution becomes void if the same is not executed in conformity with the said provision, as the requirement in relation to contract executed in exercise of executive power of the Union or State under Article 299(1) of the Constitution is mandatory. However, every auction of Excise contract for sale of intoxicants is a leasing of the Government's right of selling intoxicants, as the State Government under Section 18 of the Excise Act has the exclusive privilege of manufacturing, selling and possessing intoxicants for consideration. Therefore, the Excise contract under the said Act, which comes into being on acceptance of the bid, is a statutory contract falling outside the purview of Article 299(1) of the Constitution of India.

66. The distinction between the contracts which are executed in exercise of the executive powers and contracts which are statutory in nature has been explained by the Supreme Court in **Lal Chand**'s case **(supra).** The Supreme Court has accepted the view expressed by this Court in ***Nanhibai vs. Excise Commissioner, State of M.P. AIR 1963 MP 352*** which judgment was also approved by the Full Bench in ***Ram Ratan Gupta vs. State of M.P., AIR 1974 MP 101***. The other High Courts in ***Ajodhya Prasad Shaw v. State of Orissa, AIR 1971 Ori. 158*** *and* ***M/s Shree Krishna Gyanoday Sugar Ltd. v. State of Bihar, AIR 1975 Pat 123*** had observed that when the State Government in

exercise of its powers under a provision similar to Section 22 of the Punjab Excise Act, 1914 grants the exclusive privilege of manufacturing, or supplying or selling any intoxicant like liquor to any person on certain conditions, there comes into existence a contract made in exercise of its statutory powers and such a contract does not amount to a contract made by the State in exercise of the executive powers under Article 299(1) of the Constitution of India. The relevant paragraph from the judgment in **Lal Chand**'s case (**supra**) is reproduced as under:-

> "11. It is well settled that Article 299(1) applies to a contract made in exercise of the executive power of the Union or the State, but not to a contract made in exercise of statutory power. Article 299(1) has no application to a case where a particular statutory authority as distinguished from the Union or the States enters into a contract which is statutory in nature. Such a contract, even though it is for securing the interests of the Union or the States, is not a contract which has been entered into by or on behalf of the Union or the State in exercise of its executive powers. In respect of forest contracts which were dealt with by this Court in *K.P. Chowdhary v. State of M.P., AIR 1967 SC 203, Mulamchand v. State of M.P. AIR 1968 SC 1218, State of M.P. v. Rattan Lal, 1967 MPLJ 104, and State of M.P. v. Firm Gobardhan Dass Kailash Nath, (1973) 1 SCC 668 cases*, there are provisions in the Indian Forest Act, 1927 and the Forest Contract Rules framed thereunder for entering into a formal deed between the forest contractor and the State Government to be executed and expressed in the name of the Governor in conformity with the requirements of Article 299(1), whereas under the Punjab Excise Act, 1914, like some other State Excise Acts, once the bid offered by a person at an auction sale is accepted by the authority competent, a completed contract comes into existence and all that is required is the grant of a licence to the person whose bid has been accepted. It is settled law that contracts made in exercise of statutory powers are not covered by Article 299(1) and once this distinction is kept in view, it will be manifest that the principles laid down in K.P. Chowdhary, Mulamchand, Rattan Lal and Firm Gobardhan Dass' cases are not applicable to a statutory contract e.g. an Excise contract. In such a case, the Collector acting as the Deputy Excise & Taxation Commissioner conducting the auction under Rule 36(22) and the Excise Commissioner exercising the functions of the Financial Commissioner accepting the bid under Rule 36(22-A) although they undoubtedly act for and on behalf of the State Government for raising public revenue, they have the requisite authority to do so under the Act and the rules framed thereunder and therefore such a contract which comes into being on acceptance of the bid, is a statutory contract falling outside the purview of Article 299(1) of the Constitution."
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> (emphasis supplied)

67. To bolster his submission that the contract is void for non-compliance of Article 299 of the Constitution of India as it was not entered in the name of the Governor, the learned senior counsel for the petitioners relied upon the judgment In **M/s Om Prakash Baldev Krishan (supra).** The sole question for consideration in the said case was whether the acceptance of allotment of

work of construction of high level bridge over river Tangri on Patiala-Pehewa Road in favour of the respondent-contractor was issued on behalf of the Governor of Punjab or not. The stand of the respondent therein was that his tender was not accepted by the Governor of Punjab as it was mandatory under the Constitution in order to amount to a valid acceptance. On an application filed by respondent under Section 33 of the Arbitration Act, 1940, the Sub-Judge observed that in the tender itself it was laid down that the tender together with acceptance thereof would constitute a valid and binding contract between the parties and after analysing the evidence on record, came to the conclusion that the tender form was duly signed by the respondent and the appellant and accordingly held that there was a valid contract and dismissed the application. The High Court reversed the order on the ground that in the acceptance letter, the Executive Engineer had required the respondent at the end to sign the agreement, which was under preparation within ten days. It remained undisputed that no such agreement was ever signed. Hence, it was held that no contract in conformity with Article 299(1) of the Constitution, which was a constitutional requirement in the case, had been entered into between the parties. Before the Supreme Court, it was contended on behalf of the State that in terms of Clause 2.76 of the Public Works Department Code, the Executive Engineer of the buildings and roads was authorised to enter into such contracts. The Supreme Court affirmed the order of the High Court and held that Article 299(1) of the Constitution is based on public policy. The Executive Engineer had signed the contract but nowhere in the contract it was offered and accepted or expressed to be made in the name of the Governor. Though the parties were to attend the office within 10 days to sign the agreement which was under preparation but no such agreement was signed. Therefore, there was no valid and binding contract between the parties. The relevant extract of the judgment reads as under:-

> "10. Shri Nayar further sought to urge that Article 299 was for the Governments' protection in order to protect it against unauthorised contracts being entered on behalf of the Government. In the instant case, according to Shri Nayar, the Executive Engineer had issued the tender and had accepted the tender, authority to accept the tender on behalf of the Governor, is thus established. Shri Nayar submitted that once that authority is established and it is made clear from the evidence that the authorities have acted on that basis, then it must be presumed that the contract had been entered into in accordance with the provisions of Article 299 of the Constitution. ln view of

the clear position in law, it is, however, not possible to accept this submission.

11. Clause (1) of Article 299 of the Constitution provides as follows:

> (1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise.

12. In this case, the Executive Engineer has signed the contract but nowhere in the contract it was offered and accepted or expressed to be made in the name of the Governor. The constitutional requirement enjoined in Clause (1) of Article 299 of the Constitution is based on public policy. This position has been made clear by this Court in The State of Bihar v. M/s. Karam Chand Thapar & Brothers Ltd., [1962] 1 S.C.R. 827. There a dispute between the respondent and the Government of Bihar over the bills for the amount payable to the company in respect of the construction works carried out by it for the government was referred to arbitration. Section 175(3) of the Government of India Act, 1935 provided as follows:

> Subject to the provisions of this Act with respect to the Federal Railway authority, all contracts made in the exercise of the executive authority of the Federation or of a province shall be expressed to be made by the Governor- General, or by the Governor of the Province. as the case may be, and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the Governor-General or Governor by such persons and in such manner as he may direct or authorise.

13. This Court reiterated that under that section a contract entered into by the Governor of a Province must satisfy three conditions, namely, (i) it must be expressed to be made by the Governor; (ii) it must be executed; and (iii) the execution should be by such persons and in such manner as the Governor might direct or authorise. These three conditions are required to be fulfilled. This position was reiterated by this Court again in Seth Bikhraj Jaipuria v. Union of India, [l962] 2 S.C.R. 880. This Court explained that three conditions as mentioned in State of Bihar v. M/S. Karam Chand Thapar (supra) had to be fulfilled, and further reiterated that the object of enacting these provisions was that the State should not be saddled with liability for unauthorised contracts and, hence, it was provided that the contracts must show on their faces that these were made by the Governor-General and executed on his behalf in the manner prescribed by the person authorised. It is based on public policy. No question of waiver arises in such a situation. If once that position is reached, and that position is well settled by the authorities over a long lapse of time, no question of examining the purpose of this requirement arises. In Union of India v. A.L. Rallia Ram, [1964] 3 S.C.R. 164 this Court again reiterated that the agreement under arbitration with the Government must be in accordance with section 175(3) of the Government of lndia Act, 1935. These principles were again reiterated by this Court in Timber Kashmir Pvt. Ltd. etc. etc. v. Conservator of Forests, Jammu & Ors. etc., [1977] 1 S.C.R. 937. There, the Court was concerned with section 122(1) of the Jammu & Kashmir Constitution which corresponded to Article 299(1) of the Constitution of India. In that case all

the three applications filed by the respondent State for a reference to an arbitrator under section 20 of the Jammu & Kashmir Arbitration Act, were dismissed by a single Judge of the Jammu & Kashmir High Court on the ground that the arbitration clause was, in each case, a part of an agreement which was not duly executed in accordance with the provisions of section 122(1) of the Jammu & Kashmir Constitution which corresponded to those of Article 299(1) of the Constitution of India. But the Division Bench allowed the appeals holding that if contracts were signed by the Conservator of Forests in compliance with an order of the Government, the provisions of section 122(1) of the Jammu & Kashmir Constitution could not be said to have been infringed. This Court held that the contract could not be executed without the sanction. Nevertheless, if the sanction could be either expressly or impliedly given by or on behalf of the Government, as it could, and, if some acts of the Government could fasten some obligations upon the Government, the lessee could also be estopped from questioning the terms of the grant of the sanction even where there is no written contract executed to bind the lessee. But, once there has been a valid execution of lessee by duly authorised officers, the documents would be the best evidence of sanction. In that case, the contracts were executed on behalf of the Government of Jammu & Kashmir. The only question with which the Court was concerned in that case was whether the contracts executed by duly authorised officials had been proved or not. lt was held that it was so proved.

14. In Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. v. Sipahi Singh and others, [1978] 1 S.C.R. 375 where this Court relied on a previous decision in Mulamchand v. State of Madhya Pradesh, [1968] 3 S.C.R. 214 and reiterated that there cannot be any question of estoppel or ratification in a case where there is contravention of the provisions of Article 299(1) of the Constitution. The reason is that the provisions of section 175(3) of the Government of India Act and the corresponding provisions of Article 299(1) of the Constitution have not been enacted for the sake of mere form but they have been enacted for safeguarding the Government against unauthorised contracts. The provisions are embodied in section 175(3) of the Government of India Act and Article 299(1) of the Constitution on the ground of public policy-on the ground of protection of general public ..... and these formalities cannot be waived or dispensed with. This Court again reiterated the three conditions mentioned hereinbefore. The same principle was again reiterated by this Court in Union of India v. M/s. Hanuman Oil Mills Ltd., and others, [1987] Suppl. S.C.C. 84.

15. In the instant case, we have referred to letter dated 31st August, 1976 which towards the end stated that the parties to attend the office within 10 days to sign the agreement which is under preparation. It is common ground that no such agreement was signed.

16. In the aforesaid view of the matter the High Court was right in the view it took and the submissions made on behalf of the appellants cannot be entertained. The appeal fails and is accordingly dismissed with costs.”

Apparently, the decision in **M/s Om Prakash Baldev Krishan's case (supra)**, does not relate to excise contract but relates to works contract and therefore, the same is distinguishable and is not applicable in the present case. Thus, the said alternative submission also is of no assistance to the petitioners.

68. Another contention was put forth with regard to validity of the licence as the Excise policy nowhere gives any power for grant of licence from a retrospective date. In this regard, the background of the entire case, will have to be seen. The offer of the respective petitioners for allotment of liquor vends was accepted on different dates prior to 22nd March, 2020 as is evident from the acceptance/allotment letters contained in Annexure P-2. From 21st March, the liquor vends were directed to be closed to maintain social distancing to flatten the curve of Covid-19 pandemic. A nationwide lockdown for 21 days was declared on 24.03.2020, which was extended by issuing fresh guidelines till 03.05.2020. Till then, there was restriction on liquor shops and bars. On 01.05.2020, the Government further extended the lockdown for another two weeks from 4.5.2020 but the guidelines permitted the opening of liquor shops in orange and green zones but there was restriction on movement from 7.00 p.m. to 7.00 a.m. It was then the Department started issuing the licences from 2nd May, 2020 for operation of allotted liquor shops and vide separate letters asked the licensees to complete the remaining formalities of the policy. No doubt, the licences issued vide Annexure R-9 dated 04.05.2020, were approved for the period 01.04.2020 to 31.03.2021, which the petitioners have alleged to be a retrospective date. It appears that the licences have been issued in accordance with the policy and acceptance of bid, which provided the period of licence to commence from 01.04.2020 to 31.03.2021. Even if the licences had been issued on or before 01.04.2020, the petitioners neither could have operated the liquor shops from the said date nor could have complied with the remaining requirements of the policy due to lockdown and operation of the Act of 2005. The orders for closure of liquor shops and restrictions in operation of liquor shops, all were passed in public interest. The circumstances, in which the licences have been issued, clearly reveal that it cannot be equated with the date of implementation of the licence or issue of

licence from any retrospective date. Merely because the licences so issued to the petitioners bear the period of licence from 01.04.2020 to 31.03.2021 does not mean that the licence has been made effective from such retrospective date and the petitioners would be charged the prescribed fee for the period for which they were not allowed to operate the liquor vends. The licences have been issued as per the requirement of the policy rather than fastening any liability upon the petitioners on that count. The State Government vide order dated 31.03.2020 (Annexure R-4) has decided to waive off the licence fee for the period in financial year 2019-20 and 2020-21 during which the licensees were unable to run their liquor vends due to lockdown. There are several other concessions given to the licensees, which have been discussed and reproduced in para 13 of this order and we would eschew to repeat the same here for the sake of brevity. By amending the policy, the State Government has also extended the period of licence upto 31.05.2021. We have already held above that even though the status of the petitioners as on 01.04.2020 was not that of licensee but by virtue of acceptance of their offer, they were bound by the contract. In regard to absence of power to issue licence from retrospective effect, it is seen that Clause XXXIII of the General Licence Conditions authorizes the State Government to amend any condition of licence during the currency of the licence, which shall be effective from the commencement of the licence if not otherwise directed and the licensee shall be bound by the same. Similarly, in an affidavit submitted in terms of clause 18.3 of the policy, the validity of which has been upheld in the preceding paragraph, in para 13 of the affidavit the petitioners have undertaken that the State Government could carry out amendment in the policy 2020-21 during the currency of the licence and that would be binding on the petitioners. That apart, out of 380 liquor groups, the licensees of as many as 323 liquor groups have accepted the licences which have been allegedly issued with retrospective effect.

69. In view of the aforesaid, as noticed earlier, the inevitable conclusion is that in the present case, the contract between the parties is a valid and concluded contract and the same is binding upon the petitioners and no error, which may warrant interference with the contract, has been committed by the respondents-State in issuing the licences.

70. We now proceed to examine the question No.(iii): as to whether the amended Excise policy issued on 23.05.2020 is valid and legal. On behalf of the petitioners, it was collectively argued that the amendment dated 23.05.2020 brought in the Excise Policy 2020-21 is not only contrary to the Excise Act but it also suffers from the vice of arbitrariness. It was claimed that it is a fit case for quashing the Notification dated 23.05.2020 whereby the policy has been amended by adding Clause 16.7 thereby threatening to blacklist the contractor for future tender or renewal in case of non-acceptance of amended conditions and further clauses 12, 70, 70.6 making counteroffers purporting to be novation of contractual terms. Various other submissions, as noted above, have been made to support the said argument and the petitioners relied upon the judgments of the Supreme Court in **Syed Israr Masood** and **Monarch Infrastructure**'s cases **(supra)**. It was further urged that even the decision in **Chingalal Yadav**'s case (**supra**) relied upon by the respondents, runs contrary to their own argument on the point of arbitrariness.

71. Before we advert to each of the arguments advanced by the learned counsel for the parties with regard to validity of the amended policy dated 23.05.2020, it is to be borne in mind that the said amendment to the Excise Policy 2020-21 has been necessitated in view of the subsequent events occurred on account of Covid-19 pandemic whereby a strict lockdown was imposed to restrain the spread of the disease. Inasmuch as, in the peculiar and unavoidable circumstances, it was difficult for the petitioners to operate the liquor vends as also to the respondents to get the remaining necessary requirements of the Excise Policy 2020-21 completed. A perusal of the new insertions to the policy, namely, Clauses 70 and 70.6, shows that for extension of the licence period upto 31.05.2021, an option has been given to the licensees whether to opt for the same or not. Thus, wherever it was required, the consent of the licensees has been sought.

72. It was alleged that the State has unilaterally amended the Excise Policy without the consent of the petitioners and that the amendment to the policy, if any, was to be made before issuing the licences. The changes made in the policy are not comprehensive or practicable and are *de hors* the provisions of

the Excise Act. Reliance was placed upon the judgment in **Joint Action Committee**'s case (**supra**). However, a careful reading of the said judgment shows that the Supreme Court has held that the terms and conditions of the contract cannot be unilaterally altered or modified unless there exists any provision either in contract itself or in law. The relevant paragraph of the said decision is as follows:

> "66. …. Terms and conditions of the contract can indisputably be altered or modified. They cannot, however, be done unilaterally unless there exists any provision either in contract itself or in law. Novation of contract in terms of Section 60 of the Contract Act must precede the contract making process. The parties thereto must be ad idem so far as the terms and conditions are concerned."

73. In our considered view, the said judgment does not assist the case of the petitioners. In the present case, Section 62 of the Excise Act *inter alia* empowers the State to make rules for the purposes of carrying out the provisions of the Act. The State is authorised to make rules prescribing the powers and duties of Excise Officers; regulating the import, export, transport, manufacture, collection, possession, supply or storage of any intoxicant; regulating the period and localities for which the licences for the wholesale or retail vend of any intoxicant may be granted; prescribing the procedure to be followed and matters to be ascertained before granting licence for liquor vend in any locality; regulation of amount, time, place and manner of payment of any duty or fee or tax or penalty; prescribing the authority by, the form in which, and terms and conditions on and subject to which any licence, permit or pass shall be granted and all other matters connected therewith. The proviso attached to Section 62 of the Excise Act specifically provides that any such rules may be made without previous publication if the State Government considers that they should be brought into force at once. In view of the specific provision contained in Section 62 of the Act, the State has the power to make rules. The last two lines of the opening paragraph of the Excise Policy 2020-21, which was published for the knowledge of common public and special information of retail contractors of the Excise also reads that the State reserves its right to make necessary changes in the regime/arrangement approved for the year 2020-21 during the currency of the period 2020-21. Still further, the petitioners while submitting the statutory affidavit with the offer

in terms of Clause 18.3 of the Excise policy, in Clause 13 thereof have specifically agreed to the power of the State Government to make amendment in the Excise Policy 2020-21 during the licence period. Thus, it would debar them from raising such a plea and operate as promissory estoppel against them. Moreover, even in the absence of filing of original affidavit, the said condition would not lose its efficacy. Therefore, no interference is called for on any grounds, namely, the unilateral amendments have been incorporated in the policy; or that the policy should have been amended before issuing the licences; or that the petitioners were given only five days to accept or not to accept the newly added provisions. Even before amending the policy on 23.05.2020, considering the practical difficulties of the licensees, the State Government granted several concessions to the licensees to compensate them and enable them to run the liquor shops even before the licence period had actually commenced. As stated by the respondents, not only the petitioners but all the successful bidders' interest has been taken care of to some extent. The argument with regard to sustaining the loss in the operation of licence for the period 2020-21 is not one-sided. Both the parties may have sustained some loss, which cannot be compensated to each other, except within the modes available in the policy itself especially Clauses 49 and 54 incorporated therein. Framing of the policies is within the domain of the employer. The Court cannot direct to frame a policy which suits a particular person the most. Therefore, the judgment in **Joint Action Committee**'s case (**supra**) is of no help to the petitioners.

74. Relying upon the judgment in **UP Rajkiya Nirman Ltd.**'s case **(supra**), it was contended on behalf of the petitioners that the amended policy issued on 23.05.2020 was brought as a counteroffer. We are not inclined to accept this submission as well. It has already been held above that the State has the power to amend the policy by virtue of Section 62 of the Excise Act and Clause 13 of the affidavit submitted by them in terms of Clause 18.3 of the policy. Moreover, a perusal of the clauses enumerated in the amended policy clearly shows that clause 16.7 which has been added regarding debarring a person from participating in the tender process already exists in Clause III of the Rules of General Application. Further by clause 70 of the

amended policy, the State has only extended the policy for a further period of two months till 31.05.2021, which is to benefit the petitioners. While answering the first question involved in the case, we have already held that by the communication of acceptance of the offer by the respondents, no new offer has been made. Thus, the amended policy dated 23.05.2020 does not tantamount to a counteroffer. The decision in **UP Rajkiya Nirman Ltd's case (supra)** holding that where an offer is given by a party to the other side and the other side introduces material alteration therein, it would amount to a counteroffer, was rendered in the circumstances, where the source of the contract between the parties had not transformed into a contract. Therefore, the same does not provide support to the case of the petitioners. The relevant extract of the judgment reads as under:-

> "16. Since the tenders - the source of the contract between the parties - had not transformed into a contract, even if the proposal and counter proposal are assumed to be constituting an agreement, it is a contingent contract and by operation of Section 32 of the Contract Act, the counter proposal of the respondent cannot be enforced since the event of entering into the contract with the Board had not taken place.
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> *** *** ***
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> 18. As found earlier, there is no signed agreement by a duly competent officer on behalf of the appellant. The doctrine of "indoor management" cannot be extended to formation of the contract or essential terms of the contract unless the contract with other parties is duly approved and signed on behalf of a public undertaking or the Government with its seal by an authorised or competent officer. Otherwise, it would be hazardous for public undertakings or Government or its instrumentalities to deal on contractual relations with third parties."

75. Now examining the judgment in **Syed Israr Masood**'s case **(supra),** the Supreme Court held that the substantial variance between the particulars of quantity and quality of the material stated at the time of auction and which was actually found to be available on the site, would substantially alter the very foundation of the contract and therefore, the contractor was entitled to repudiate the contract and claim refund of the amount deposited by him but in view of incorporation of a specific clause in the contract disentitling the contractor to claim compensation, no compensation would be payable. The relevant extract is as follows:

> "9. We may at this stage refer to Condition 3 in the sale-notice (Ex.D/1) on which strong reliance was placed on behalf of the respondent. That Condition reads:
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> > The details of quantities of forest produce announced at the time of auction are correct to the best of the knowledge of the Divisional Forest Officer but are not guaranteed to any extent. The intending bidders are, therefore, advised to inspect on the spot the contract area and the produce they intend to bid for with a view to satisfy themselves about its correctness. No claim shall lie against the State Government for compensation or any other relief, if the details of the quantities are subsequently found to be incorrect.
>
> In our opinion, the trial court was perfectly right in its view that, while the said condition will operate to prevent the contractor from claiming any damages or compensation from the State Government on the ground that the details of the quantity of the forest produce were subsequently found to be incorrect, it will not preclude him from repudiating the contract on its being found that there was substantial variance between the particulars furnished at the time of the auction regarding the quantity and quality of timber that will be available for extraction in the concerned coupes and the quantity etc. of tree growth actually found to be available on the site. It has been clearly established by the evidence in this case that a very substantial quantity of timber standing on the bank of Nalla had been marked for extraction and numbered and the auction-sale had been held on the basis that the highest bidder would be entitled to fell and remove all those trees. But by the time the coupes were allowed to be inspected by the auction-purchaser, that area was declared to be "reserved", with the result that there was a complete prohibition against the felling of any timber therefrom. This has substantially altered the very foundation of the contract and hence it was perfectly open to the plaintiff to repudiate the contract and claim a refund of the amount deposited by him as a part payment of the purchase price.
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> 10. We are unable to agree with the view expressed by the High Court that the plaintiff cannot succeed unless he proved that, even after excluding the trees standing on the reserved area, the rest of the forest did not have sufficient number of trees which would satisfy the assurance given at the time of the auction. The subject-matter of the auction-sale was the totality of the trees which were marked for cutting in the two coupes. Since a substantial number of the marked trees was contained in the area which was subsequently declared as "reserved", it is inevitable that there was a corresponding diminution in the total quantity of timber which was announced as available for cutting at the time of the auction-sale.
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> 11. We do not, therefore, find it possible to agree with the reasons stated by the High Court for refusing the plaintiff's prayer for refund of the amount paid by him by way of the first installment of the sale price. The conclusion recorded by the trial court on this issue was perfectly correct and the High Court was in error in interfering with the said finding."

In the present case also the consequences of non-performance of the contract due to any policy decision of the State are provided in Clauses 48 and 49 of the Excise Policy, therefore, the said decision does not render any help to the case of the petitioners. Similar provisions in Clauses 9.6, 10.1.3, 10.1.6, 10.1.7, 10.1.9, 44, 48 and 49 are also contained in the policy in case the successful bidder chooses not to comply with the terms and conditions of

acceptance letter and licence conditions. Thus, the petitioners having participated in the tender with full knowledge of these provisions, cannot be subsequently heard to say that these conditions are arbitrary and illegal in any manner.

76. The petitioners also relied upon the judgment of the Supreme Court in **Monarch Infrastructure**'s case (**supra**) and Full Bench decision of this Court in **Chingalal Yadav**'s case (**supra**) to contend that the court may interfere with the contract if the acts of the Government are arbitrary or contrary to public interest or even if some disputed questions of fact are involved. There is no dispute with regard to the legal position enumerated therein. However, it is noted that in **Monarch Infrastructure**'s case (**supra**), the Supreme Court has made it clear that the court is not the best judge to say that which tender conditions would be better and it is left to the discretion of the authority calling the tender and therefore, reliance placed by the petitioners on the said decision is misplaced. The relevant extract of the decision is as under:-

> "10. There have been several decisions rendered by this Court on the question of tender process, the award of contract and have evolved several principles in regard to the same. Ultimately what prevails with the courts in these matters is that while public interest is paramount there should be no arbitrariness in the matter of award of contract and all participants in the tender process should be treated alike. We may sum up the legal position thus:
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> (i) The Government is free to enter into any contract with citizens but the court may interfere where it acts arbitrarily or contrary to public interest.
>
> (ii) The Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate.
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> (iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons.
>
> 11. Broadly stated, the courts would not interfere with the matter of administrative action or changes made therein, unless the Government's action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is mala fide.
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> 12. If we bear these principles in mind, the High Court is justified in setting aside the award of contract in favour of Monarch Infrastructure (P) Ltd. because it had not fulfilled the conditions relating to clause 6(a) of the Tender Notice but the same was deleted subsequent to the last date of acceptance of the tenders…..
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> *** *** ***

> 14. Now we will turn to the last question formulated by us. The High Court had directed the commencement of a new tender process subject to such terms and conditions, which will be prescribed by the Municipal Corporation. New terms and conditions have been prescribed apparently bearing in mind the nature of contract, which is only collection of octroi as an agent and depositing the same with the Corporation. In addition, earnest money and the performance of bank guarantee are insisted upon; collection of octroi has to be made on day-to-day basis and payment must be made on a weekly basis entailing, in case of default, cancellation of the contract. We cannot say whether these conditions are better than what were prescribed earlier for in such matters the authority calling for tenders is the best judge….."

77. In **Chingalal Yadav**'s case (**supra**), the issue before the Full Bench of this Court was with regard to scope of interference with the Excise policy of the State in respect of grant of licence for manufacture and sale of liquor. The Court declined to exercise the power of judicial review unless the same was shown to be contrary to any statutory provision. The conclusions recorded by the Bench read, thus:

> "37. Scope of interference in policy matters in exercise of powers of judicial review is well settled by a catena of decisions. In *T.N. Education Deptt., Ministerial and General Subordinate Services Assn. vs. State of T.N., (1980) 3 SCC 97* the Supreme Court while noticing the jurisdictional limitation to analyse and to find fault with the policy held that the Court in exercise of its power of judicial review cannot sit in judgment over the policy matters except on limited grounds, namely, whether the policy is arbitrary, mala fide, unreasonable or irrational. Each State is empowered to formulate its own liquor policy.
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> 38. In *Nandlal Jaiswal and others (supra)* the Supreme Court held that while considering the applicability of Article 14 of the Constitution in case pertaining to trade or business in liquor, the Court would be slow to interfere with the policy laid down by the State Government for grant of license for manufacture and sale of liquor……..
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> 40. In a recent decision of Supreme Court rendered in case of *Villianur Iyarkkai Padukappu Maiyam vs. Union of India and others, (2009) 7 SCC 561*, the Supreme Court once again reiterated that in the matters of economic policy the scope of judicial review is very limited and the Court will not interfere with economic policy of the State unless the same is shown to be contrary to any statutory provision of the Constitution. The Court cannot examine the relative merits of different economic policies and cannot strike down a policy merely on the ground that another policy would have been fairer and better. Wisdom and advisability of economic policy are ordinarily not amendable to judicial review. It was further held that in matters relating to economic issues, the Government while taking the decision was right to 'trial and error' so long it is bona fide and within the limits of the authority. For testing the correctness of a policy the appropriate forum is Parliament and not the Courts. It was further held that there is always a presumption that Governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it lacks reasonableness and is not in public interest. The onus is heavy one and has to be discharged to the satisfaction of the Court by bringing proper and adequate material on record.

41. From the aforesaid decisions of the Supreme Court the principles of law which can be culled out can be summarized as follows:

(i) Grant of licence for manufacture and sale of liquor is a matter of economic policy where the Court would be slow to interfere unless the policy is plainly arbitrary, irrational or mala fide.

(ii) The Court must while adjudging the constitutional validity of an executive decision relating to economic matters grant certain measure of freedom or 'play in joint' to the executive.

(iii) The Court cannot strike down a policy merely because it feels that another policy would have been fairer or wiser or more scientific or logical.

(iv) Parting of privilege exclusively vests with the Government and the same can be questioned only on the ground of bad faith, based on irrational or irrelevant consideration, violation of any constitutional or statutory provision.

(v) It is not normally within the domain of the Court to weigh the pros and cons of the policy. In case of policy decision on economic matters the Court should be very circumspect and must be most reluctant to impugn the judgment of experts who have arrived at a conclusion.

(vi) Court cannot examine relative merits of different economic policy. In a democracy it is a prerogative of each elected Government to formulate its policy. Wisdom and advisability of economic policy are ordinarily not amenable to judicial review.

(vii) In matters relating to economic issues, the Government has while taking a decision right to "trial and error" as long as both trial and error are bona fide and within limits of the authority.

(viii) Normally there is a presumption that governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness and the burden is a heavy one which has to be discharged to the satisfaction of the Court by bringing proper and adequate material on record.

57. In view of preceding analysis our answer to the questions referred for opinion are as follows:

(1) Under rule 8(1)(a) of the M.P. Foreign Liquor Rules, 1996 and rule 9 of the M.P. Country Spirit Rules, 1995, it is open to the State Government to renew the licence of existing licensee on such condition, which it may prescribe or invite applications for grant of licence, or deal with grant of licence in such other manner as it may determine.

(2) We agree with the conclusion recorded by the Division Bench of this court in Madan Mohan Chaturvedi (supra) however, for different reasons which have already been referred to in preceding paragraphs. The expression "or in any such other manner as the State Government may direct from time to time" will qualify the powers of the Government in granting the licence, and is not required to be read in relation to disposal of applications which cannot be disposed of by draw of lottery.

(3) The new liquor policy which provides for renewal of existing licence with further condition that renewal will take place only when the said renewal will generate more than 80% of the estimated

> revenue for the year 2010-11 at the district level is a valid policy and does not create any monopoly.
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> (4) The new policy is a valid policy as the same is not in contravention with rule 8(1) of M.P. Foreign Liquor Rules, 1996. Requirement of inviting the application has not been dispensed with under the new policy. Licence in respect of each shop is being granted by inviting the application. Renewal of licence is a mode of allotment which is permissible under rule 8(1)(a) of M.P. Foreign Liquor Rules,1996.
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> (5) The judgment rendered by the Division Bench in Madan Mohan Chaturvedi (supra) does not decide the question of vires of policy and this Court has jurisdiction to consider the constitutional validity/statutory validity of the policy. In our view the New Policy is neither violative of Article 14 of the Constitution of India nor contrary to and ultra vires Rule 8(1)(a) of M.P. Foreign Liquor Rules, 1996 and Rule 9 of M.P. Country Spirit Rules, 1995 and Section 62 of the Excise Act, 1915."

Considering the aforesaid two judgments vis-a-vis the facts of the present case, the decision to amend the policy and the conditions of licence was taken in the circumstances, which called for the necessity to synchronize the economic activities and health care issues, which were completely getting disrupted due to pandemic and in a way, both reached at the verge of becoming dependent upon each other. All decisions relating thereto were/are taken in public interest and therefore, there is no element of arbitrariness much less specifically pointed out by the petitioners. No provision has been shown by the learned counsel for the petitioners which does not empower the State to amend the policy. Thus, the decisions in the cases of **Monarch Infrastructure** and **Chingalal Yadav** (**supra**) do not come to the rescue of the petitioners.

78. Having bowed down to the power of the State by submitting an affidavit with the bid bearing Clause 13 in terms of Clause 18.3 of the policy that the petitioners would be bound by any changes in the arrangement of Excise policy during the period 2020-21, it shall not be open for the petitioners to claim that their prior consent was required for making changes to the policy and terms and conditions of the licence. While answering the first question involved in the case, we have already found that there was no fault in the fulfillment of condition of submitting affidavit merely because its original was not submitted.

79. Relying upon the decision in **Bharat Sanchar Nigam Limited**'s case **(supra)**, learned senior counsel for the petitioners had vehemently argued that the respondents failed to notify the orders pertaining to change of timings of shops, period of licence, curtailing the facilities of *Ahatas* etc. in the official gazette in terms of Section 63 of the Excise Act. The reference was made to paras 43, 46, 51 and 56, which read as under:-

> "43. In view of the aforementioned law laid down by this Court, there cannot be any doubt whatsoever that the circular letters cannot ipso facto be given effect to unless they become part of the contract. We will assume that some of the respondents knew thereabout. We will assume that in one of the meetings, they referred to the said circulars. But, that would not mean that they are bound thereby. Apart from the fact that a finding of fact has been arrived at by the TDSAT that the said circular letters were not within the knowledge of the respondents herein, even assuming that they were so, they would not prevail over the public documents which are the brochures, commercial information and the tariffs.
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> 46. The respondent had two options. They were asked to choose one. Thus, a representation was made that they would be entitled to obtain lease of the equipments (resources) on R&G basis. Payments have been made on that basis. The question which would arise for consideration is as to whether the basis of making a demand itself can be changed. The answer to the said question, in our opinion, must be rendered in the negative.
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> 51. In the instant case, the resources to be leased out were subject to agreement. The terms were to be mutually agreed upon. The terms of contract, in terms of Section 8 of the Contract Act, fructified into a concluded contract. Once a concluded contract was arrived at, the parties were bound thereby. If they were to alter or modify the terms thereof, it was required to be done either by express agreement or by necessary implication which would negate the application of the doctrine of `acceptance sub silentio'. But, there is nothing on record to show that such a course of action was taken. The respondents at no point of time were made known either about the internal circulars or about the letters issued from time to time not only changing the tariff but also the basis thereof.
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> 56. Why publication is necessary so as to enable the parties to take recourse thereto has been considered by this Court in B.K. Srinivasan v. State of Karnataka [(1987) 1 SCC 658] in the following terms (SCC pp.672-73, para-15):
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> > "15. There can be no doubt about the proposition that where a law, whether parliamentary or subordinate, demands compliance, those that are governed must be notified directly and reliably of the law and all changes and additions made to it by various processes. Whether law is viewed from the standpoint of the "conscientious good man" seeking to abide by the law or from the standpoint of Justice Holmes's 'unconscientious bad man' seeking to avoid the law, law must be known, that is to say, it must be so made that it can be known. We know that delegated or subordinate legislation is all-pervasive and that there is hardly any field of activity where governance by delegated or subordinate legislative powers is not as important if not

> more important, than governance by parliamentary legislation. But unlike parliamentary legislation which is publicly made, delegated or subordinate legislation is often made unobtrusively in the chambers of a Minister, a Secretary to the Government or other official dignitary. It is, therefore, necessary that subordinate legislation, in order to take effect, must be published or promulgated in some suitable manner, whether such publication or promulgation is prescribed by the parent statute or not. It will then take effect from the date of such publication or promulgation. Where the parent statute prescribes the mode of publication or promulgation that mode must be followed. Where the parent statute is silent, but the subordinate legislation itself prescribes the manner of publication, such a mode of publication may be sufficient, if reasonable. If the subordinate legislation does not prescribe the mode of publication or if the subordinate legislation prescribes a plainly unreasonable mode of publication, it will take effect only when it is published through the customarily recognised official channel, namely, the Official Gazette or some other reasonable mode of publication. There may be subordinate legislation which is concerned with a few individuals or is confined to small local areas. In such cases publication or promulgation by other means may be sufficient."

80. With due regard to the law laid down by the Supreme Court in **Bharat Sanchar Nigam Limited**'s case (**supra**), we find the argument that there is violation of the terms and conditions of the Excise policy by not notifying the orders pertaining to change of timings of shops, period of licence, curtailing the facilities of *Ahatas* etc. in the official gazette unlike the Excise Policy and amended policy dated 23.05.2020 in terms of Section 63 of the Excise Act, is only in the realm of submission having not much force of law. A perusal of Section 63 itself shows that the requirement of such publication is only with respect to the rules and notifications. The Excise policy is a subordinate legislation, which has been notified in the official Gazette. There is no dispute that the Excise Policy dated 25.02.2020 and the Amended Excise Policy dated 23.05.2020 were duly notified in the official Gazette. If the State by issuing the circulars is giving certain options, concessions and reliefs to the petitioners to tide over their difficulties in running their trade and making compliance of terms and conditions of the contract, the action of the State cannot be faulted with on that score. It is not the case of the petitioners that without publishing such circulars in the official Gazette in terms of Section 63 of the Excise Act, the benefits which were otherwise available through the Acts, Rules and policies, have been taken away from the licensees. As observed earlier, the amendment/change in the policy has not been made by

the Excise Department or the Collectors, the amended policy has been duly notified under Section 63 of the Excise Act.

81. Mr. Sanjay Agarwal, learned counsel for the petitioners specifically contended that in terms of Clause 16.7 of the amended policy dated 23.05.2020, a licensee for the year 2020-21 whose licence has been cancelled, would be blacklisted from participating in any future contracts. In our opinion, the said clause has been misunderstood. Clause 16.7 of the amended policy reads that for the year 2020-21, in the case of any licensee in respect of whose licence for the liquor shop/group/single group be it fully owned by him or having partial ownership in the capacity as Partner of a Firm/Director of Company/Share Holder, orders for cancellation or re-auction in any of the District of the State has been passed, shall be ineligible to participate in the process of allotment of liquor shops in any of the District of the State in the Excise Policy of 2020-21 (both main and amended) through any of the modes prescribed therein. A perusal of the said clause clearly shows that the licensee for the year 2020-21 is not prohibited from participating in the tender process in any future contracts but the prohibition as such is only for the year 2020-21. Secondly, a clause in respect of debarment of a person from bidding is not brought by the respondents for the first time. The said clause does exist in the Rules of General Application framed under Section 62 of the Excise Act. Clause III of the Rules of General Application provides that former licences who owe arrears of excise revenue to Government, or whose conduct as licensee has been unsatisfactory, or who have been guilty of serious breaches of their licences under the Excise Act and other Acts or the rules made thereunder, shall not be entitled to bid at the auction without the consent of the Collector or District Excise Officer or the officer holding the auction. There is no dispute that these Rules are part of the terms and conditions of the Excise Policy.

82. A juxtapose reading of Clause III of the Rules of General Application and Clause 16.7 of the amended policy makes no distinction between the two, as under the said Rules, the respondents are authorised to decide the location of shops, period of licence, debarring certain persons from bidding and power

of confirmation of auction sale or acceptance/rejection of bid which has been conferred upon the Excise Commissioner or Collector, as the case may be. In view of the said fact, we do not find that by adding clause 16.7 through amended policy dated 23.05.2020, the respondents have given any counteroffer to the petitioners or that it has been added to coerce the petitioners or to undermine their option to move the Court.

83. The blacklisting of a commercial Firm has serious civil consequences as it affects the reputation of the Firm and therefore, before any such decision is taken the principles of natural justice must be adhered to. However, in the present case, whether it is Rule III of the Rules of General Application or Clause 16.7 of the amended policy, the purport of the language used therein clearly suggests that it is an eligibility clause to participate in the tender process rather than the order of blacklisting a Firm. In any case, under Sub-Rule (5) of Rule III of the Rules of General Application, an appeal is provided to the Excise Commissioner or any officer authorised in this behalf. Thus, we do not find any ground to hold that Clause 16.7 of the amended policy is illegal in any manner.

84. Challenge to the amended policy was also made on the ground that it could not have been changed during the currency of the contract or the licence period. Strong support was drawn from the judgment in **Karambir Nain**'s case (**supra**) wherein it was held that though the terms of the licence are statutory in nature, the same cannot be changed by the State in between the licence period, without either seeking consent of the licensees or without giving opportunity to the licence to repudiate the contract. The State has denied the applicability of the said decision on the ground that the facts of the said case are different. Inasmuch as, during currency of the licence period after the licences had been issued, Clause 2B relating to shifting and surrender of liquor vends on the National and State Highways to the detriment of the licensees was inserted; it became prohibited in law to perform the contract and further there was no provision in the Punjab Excise Act, 1914 or Haryana Liquor Licence Rules, 1970 to change the terms of the licence and excise policy.

85. As it was urged by the petitioners that law laid down in **Karambir Nain**'s case (**supra**) squarely governs the facts of the present case, it would be imperative to examine the same in detail. In the case of **Karambir Nain** (**supra**), the petitioners therein were allotted composite licence for group of liquor vends for the period from 01.04.2013 to 31.03.2015 under the Excise Policy 2013-14 which was made for two years. The liquor vends on National Highways were also auctioned in spite of the direction of the National Highways Authority of India and Government of India. One society, namely, Arrive Safe filed a PIL challenging the policy of the State bearing CWP No.25777 of 2012 (Arrive Safe Society of Chandigarh v. National Highway Authority of India). On 22.12.2012, notice of motion was issued for 23.1.2013 but the petition ultimately came to be decided on 18.3.2014 directing that no liquor vend shall be permitted to be opened on the National or State Highway w.e.f. 01.04.2014. The State, instead of curtailing the policy for one year issued amended policy for remaining year of 2014-15. Accordingly, the petitioners were asked to close down or shift retail liquor vends on the National or State Highway and continue with the other liquor vends of the group which did not fall on highways. The Court found that no provision was shown under the Punjab Excise Act, 1914 or the Haryana Liquor Licence Rules, 1970 empowering the State to change the terms of the licence during the currency of the licence or change the location of the vends and further, the problem itself was aggravated by the State by bringing the policy for two years for the first time when the lis against opening of the liquor vends on the highways was already pending before the Court, which should have been avoided by the State. It was, in these circumstances, the Court held that the State cannot be permitted to change the rules of the game announced at the time of Excise policy unilaterally. However, in the present case, in terms of Section 62 of the Excise Act, the State is not only empowered to make the rules but a perusal of last two lines of the opening paragraph of the Excise Policy dated 25.02.2020 and Clause 13 of the affidavit uploaded by the petitioners with the bid in terms of Clause 18.3 of the policy also shows that the petitioners would be bound by any changes to be made in the policy. Moreover, in that case, the sale of liquor on Highways

was strictly prohibited in compliance of the Court's order during the entire period of the policy but here, even on the own showing of the petitioners, the sale of liquor was prohibited during the lockdown period and it remained affected for a period of two months though there may be still red and containment zones and restrictions but it is not the case of complete prohibition on sale of liquor or case of total unlawfulness of sale of liquor. The period of licence which has been lost by the petitioners, has been tried to be adjusted by the respondents by providing two extra months for continuation of the licence upto 31.05.2021, if the licensees may choose to do so. Thus, it can be said that the sale of liquor in the present case was partially prohibited unlike in the case of **Karambir Nain**'s case (**supra**). Thus, the judgment in **Karambir Nain**'s case (**supra**) is distinguishable on facts and does not inure to the benefit of the petitioners.

86. Ancillary question that arises in the present facts and circumstances relates to the scope of judicial review in policy decisions. The Supreme Court in catena of pronouncements had the occasion to consider this issue. In **Mohd. Fida Karim**'s case **(supra)**, amendment to the existing policy with regard to settlement of liquor vends which was to be made by auction-cum-tender method framed under Bihar Excise Act, 1915, was called in question. The Court observed, thus:-

> "5. Similar contentions have been raised before us on behalf of the appellants, which were made before the High Court. The challenge to the new policy has been made on the following three grounds. Firstly, it has been submitted that there is no provision in the Excise Act or the Rules to review or revoke the grant of licence or to curtail or reduce the period of licence except as provided under Sections 42 and 43 of the Excise Act. The licence already granted for a period of five years from 1990 to 1995 cannot be made ineffective by the so-called new policy of auction-cum-tender. A further limb of this ground is that the period cannot be curtailed without compliance of the mandatory provisions of Sections 42 and 43 of the Excise Act. The second ground of challenge is that the Government is estopped from doing so on the principle of promissory estoppel. The third ground is that in any event, the exercise of power, in the facts of the case is arbitrary, irrational and patently unreasonable and as such is violative of Article 14 of the Constitution. The High Court has dealt with all these contentions in detail and has rejected the same by giving cogent reasons. We fully agree with the view taken by the High Court.
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> 6. It is important to note that the Memorandum dated 25th January, 1990 and the letter dated 8th February, 1990 and the sale Notification on the basis of which the appellants are claiming the right to continue the licence for a period of five years, clearly mentioned that the grant of licence was on

> annual basis and such renewal after every year was subject to the conditions mentioned therein and also subject to any change in policy. Thus, the Government was fully competent to change its policy under the terms of the grant of licence itself. It is also well settled that the right of vend of excisable articles is exclusively and absolutely owned by the State Government."
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> (emphasis supplied)

87. Before the Supreme Court in **Raunaq International Ltd**'s case **(supra)**, the order passed by the Bombay High Court on the writ petition of the respondent M/s I.V.R. Construction Ltd. granting interim stay on the operation of the letter of intent dated 20.07.1998 issued to M/s Raunaq International Ltd. for commissioning the power project of State Electricity Board accepting its offer in view of the price advantage to the Board and adequate experience having completed similar type of work for other units, was assailed by the appellant. The Supreme Court held that the High Court was not justified in granting stay. Under the scope of judicial review, the Court should weigh the competing public interests to find if there is overwhelming public interest as against public detriment in granting the stay. It was held as under:-

> "11. When a writ petition is filed in the High court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide the court should not intervene under Article 226 in disputes between two rival tenderers.
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> 12. When a petition is filed as a public interest litigation challenging the award of a contract by the State or any public body to a particular tenderer, the court must satisfy itself that the party which has brought the litigation is litigating bona fide for public good. The public interest litigation should not be merely a cloak for attaining private ends of a third party or of the party bringing the petition. The court can examine the previous record of public service rendered by the organisation bringing public interest litigation. Even when a public interest litigation is entertained, the court must be careful to weigh conflicting public interests before intervening. Intervention by the court may ultimately result in delay in the execution of the project. The obvious consequence of such delay is price escalation. If any re-tendering is prescribed, cost of the project can escalate substantially. What is more

important is that ultimately the public would have to pay a much higher price in the form of delay in the commissioning of the project and the consequent delay in the contemplated public service becoming available to the public. If it is a power project which is thus delayed, the public may lose substantially because of shortage in electric supply and the consequent obstruction in industrial development. If the project is for the construction of a road, or an irrigation canal, the delay in transportation facility becoming available or the delay in water supply for agriculture being available, can be a substantial set back to the country's economic development. Where the decision has been taken bona fide and a choice has been exercised on legitimate considerations and not arbitrarily, there is no reason why the court should entertain a petition under Article 226.

13. Hence before entertaining a writ petition and passing any interim orders in such petitions, the court must carefully weigh conflicting public interests. Only when it comes to a conclusion that there is an overwhelming public interest in entertaining the petition, the court should intervene.

14. Where there is an allegation of mala fides or an allegation that the contract has been entered into for collateral purposes, and the court is satisfied on the material before it, that the allegation needs further examination, the court would be entitled to entertain the petition. But even here, the court must weigh the consequences in balance before granting interim orders.

15. Where the decision-making process has been structured and the tender conditions set out the requirements, the court is entitled to examine whether these requirements have been considered. However, if any relaxation is granted for bona fide reasons, the tender conditions permit such relaxation and the decision is arrived at for legitimate reasons after a fair consideration of all offers, the court should hesitate to intervene."

88. In **Air India Limited**'s case **(supra)**, the Supreme Court has held that the State can choose its own method for award of contract but it should comply with the norms, standard and procedure. The decision has to be on the basis of overall view of the transaction after weighing various relevant factors and having regard to commercial viability. The Court shall not interfere with the decision but it can interfere with the decision-making process on grounds of *mala fide*, unreasonableness or arbitrariness. The relevant paragraph of the said decision is reproduced as under:-

"7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in *Ramana Dayaram Shetty v. International Airport Authority [(1979) 3 SCC 489], Fertilizer Corporation Kamgar Union v. Union of India [(1981) 1 SCC 568], CCE v. Dunlop India Ltd. [(1985) 1 SCC 260], Tata Cellular v. Union of India [(1994) 6 SCC 651], Ramniklal N. Bhutta v. State of Maharashtra [(1997) 1 SCC 134], and Raunaq International Ltd. v. I.V.R. Construction Ltd. [(1999) 1 SCC 492].* The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial

> scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amendable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene."
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> (emphasis supplied)

It may be noticed here that in the present case, there is no challenge to the decision-making process of the respondents but the decision itself has been impugned on the ground of arbitrariness and unreasonableness.

89. Relying upon para 12 of the judgment in **Dinesh Engineering Corporation**'s case **(supra)**, learned counsel for the petitioners had urged that though the Courts would not normally interfere with the policy decision but if the material on record indicates that such policy decision reeks of discrimination and unreasonableness, the scope of judicial review cannot be curtailed. The Court does not always have to abdicate their right to scrutinise whether the policy in question is formulated keeping in mind all the relevant facts. The relevant paragraph of the judgment reads, thus:-

> "12. A perusal of the said letter shows that the Board adopted this policy keeping in mind the need to assure reliability and quality performance of the governors and their spare parts in the context of sophistication, complexity and high degree of precision associated with governors. It is in this background that in para (i) the letter states that the spares should be procured on proprietary basis from EDC. This policy proceeds on the hypothesis that there is no other supplier in the country who is competent enough to supply the spares required for the governors used by the Indian Railways without taking into consideration the fact that the writ petitioner has been supplying these spare parts for the last over 17 years to various Divisions of the Indian Railways which fact has been established by the writ petitioner from the material produced both before the High Court and this Court and which fact has been accepted by the High Court. This clearly establishes the fact that the decision of the Board as found in the letter dated 23.10.1992 suffers from the vice of non-application of mind. On behalf of the appellants, it has been very seriously contended before us that the

> decision vide letter dated 23.10.1992 being in the nature of a policy decision, it is not open to courts to interfere since policies are normally formulated by experts on the subjects and the courts not being in a position to step into the shoes of the experts, cannot interfere with such policy matters. There is no doubt that this Court has held in more than one case that where the decision of the authority is in regard to a policy matter, this Court will not ordinarily interfere since these policy matters are taken based on expert knowledge of the persons concerned and courts are normally not equipped to question the correctness of a policy decision. But then this does not mean that the courts have to abdicate their right to scrutinise whether the policy in question is formulated keeping in mind all the relevant facts and the said policy can be held to be beyond the pale of discrimination or unreasonableness, bearing in mind the material on record. It is with this limited object if we scrutinise the policy reflected in the letter dated 23.10.1992, it is seen that the Railways took the decision to create a monopoly on proprietary basis on EDC on the ground that the spares required by it for replacement in the governors used by the Railways required a high degree of sophistication, complexity and precision, and in the background of the fact that there was no party other than EDC which could supply such spares. There can be no doubt that an equipment of the nature of a spare part of a governor which is used to control the speed in a diesel locomotive should be a quality product which can adhere to the strict scrutiny/standards of the Railways, but then the pertinent question is : has the Board taken into consideration the availability or non-availability of such characteristics in the spare parts supplied by the writ petitioner or, for that matter, was the Board alive to the fact that like EDC the writ petitioner was also supplying the spare parts as the replacement parts for the GE governors for the last over 17 years to the various Divisions of the Railways? A perusal of the letter dated 23.10.1992 does not show that the Board was either aware of the existence of the writ petitioner or its capacity or otherwise to supply the spare parts required by the Railways for replacement in the governors used by it, an ignorance which is fatal to its policy decision. Any decision, be it a simple administrative decision or a policy decision, if taken without considering the relevant facts, can only be termed as an arbitrary decision. If it is so, then be it a policy decision or otherwise, it will be violative of the mandate of Article 14 of the Constitution."
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> (emphasis supplied)

We have carefully gone through the said decision as well and in our considered opinion, the law laid down in the said decision is not attracted to the present case. In **Dinesh Engineering Corporation**'s case (**supra**), the writ petitioner-Corporation was a manufacturer of certain spare parts of GE governors used by the Railways to control the speed in diesel locomatives. The Railways invited tenders for supply of certain items of spare parts for use in GE governors. Though there was another competitor company "EDC", it was only the writ petitioner who submitted its tender. The Railway Authorities informed the writ petitioner that in the context of the sophistication, complexity and high degree of precision associated with the governor and keeping in view the need to assure their reliable and quality performance, the

Railway Board has taken a policy decision that GE/EDC governor spares should be procured on proprietary basis from EDC, who were the only equipment manufacturers till alternative sources of supply were available. The High Court quashed the order of the Railways rejecting the tender of the writ petitioner and the letter dated 23.10.1992 reflecting the said policy decision. On behalf of the respondent, it was contended that EDC being a manufacturer of complete governors, should be considered as the supplier of spares for the original equipment and was better than a manufacturer of only a spare part and further, under the guidelines, the Railways was entitled to reject any tender offer without assigning any reasons. It was in these circumstances, the Supreme Court held that the policy of the Board proceeded on hypothesis that there was no other competent supplier but the material on record revealed that the writ petitioner was supplying these spare parts for the last over 17 years to various divisions of the Railways and therefore, the policy decision so taken had suffered from non-application of mind and arbitrariness and was subject to judicial review on that ground. Whereas, in the present case, as already observed hereinbefore, the State Government has made a reasonable decision to extend the period of licence by further two months to continue upto 31.05.2021 as the initial period of licence of about two months in April and May, 2020 has been lost without much business due to pandemic. The insertion of Clause 16.7 is also not a new condition. In clause 13 of the affidavit submitted by the petitioners, the petitioners have given consent for any change to be made in the policy. Similar clause also exists in Rule III of the Rules of General Application. Thus, there is no element of arbitrariness or unreasonableness attached to the amended policy dated 23.05.2020 so as to warrant exercise of judicial review of the policy decision of the State.

90. The petitioners had put strong emphasis on Section 56 of the Contract Act. Thus, question No.(iv) concerning as to whether in the facts and circumstances of the case, the contract between the parties has become so impossible or unlawful as to excuse the petitioners from its performance in terms of Section 56 of the Contract Act, assumes great significance. A plain reading of second paragraph of Section 56 of the Contract Act, shows that the said provision applies only to the cases where there is existence of contract

between the parties. As such the doctrine of frustration can be applied only after the formation of the contract. Since we have come to the conclusion that there has been an existence of a valid concluded contract between the parties, therefore, on the argument raised on behalf of the petitioners invoking Section 56 of the Contract Act, question No.(iv) has been framed. The said question would require an answer on further three issues:

(1) Whether the outbreak of Covid-19 Pandemic, due to which the dispute has arisen between the parties, qualify as "force majeure" condition in the context of Excise Policy 2020-21?

(2) Whether by virtue of Clause 48 of the Excise Policy 2020-21, the "force majeure" condition was expressly or impliedly within the contemplation of the parties so as to exclude the applicability of Section 56 of the Contract Act?

(3) Whether the contract between the parties can be said to have become unworkable, frustrated, impossible and unlawful to perform?

91. The first two issues formulated in the preceding paragraph are interrelated, therefore, taken up together. Before we look into the question "whether the Covid-19 Pandemic can be regarded as the "force majeure" event in the context of Excise Policy 2020-21 or not, the first thing which is to be taken note of is that the petitioners initially in their rejoinder themselves referred to memorandum dated 19.02.2020, which was followed by Office Memorandum dated 13.05.2020 (both Annexure RJ-1) to claim that the Government has clarified that disruption of supply chains due to spread of Coronavirus should be considered as a case of natural calamity and force majeure clause may be invoked. On that basis, it was argued that since the Excise Policy has not taken care of the force majeure event, therefore, the performance of contract has to be excused in terms of Section 56 of the Contract Act. The State denied the applicability of the said office memoranda on the ground that they do not apply to the State. But, when the State raised the defence that Clause 48 of the policy does refer to a force majeure event, the petitioners did not emphasize on the said office memoranda. Instead, it was argued that the Clause 48 of the Excise Policy 2020-21 does

not contemplate the pandemic circumstances and implementation of the Act of 2005, therefore, Section 56 of the Contract Act applies on all fours.

92. Clause 48 of the Excise Policy, deals with the effect of closure of the liquor vends as a consequence of liquor prohibition policy or natural calamities. It is provided that in case any liquor shop/shops are closed due to any liquor prohibition policy in the State or in any neighbouring State, the licensee shall not be entitled to any compensation by the State. Clause 48 of the policy further proceeds to lay that the right to re-auction/re-execute any liquor vend in the State shall vest with the State in case any such decision is taken on account of prohibition of liquor in the neighbouring State or even due to any other reason and no objection by the licensee shall be entertained thereon and the objector shall also not be entitled to any compensation or rebate in that regard. Still further, the said clause expressly provides that in case during the period of licence, any loss is caused to the licensee as a consequence of any act of God or natural calamity, the licensee shall not be entitled to any compensation.

93. Firstly, whether it is called "act of God" or "natural calamity" as provided in Clause 48, both are deemed to be a "force majeure" event and the intention of the Central Government while issuing the office memorandum dated 19.02.2020 and 13.05.2020 (Annexure RJ-1) does indicate the Covid-19 to be a force majeure event. However, the petitioners have failed to show how the said memoranda would apply to statutory contract under the Excise Act and its policy. Otherwise also, under office memorandum dated 13.05.2020 force majeure event is only for extension of contract period in view of the restrictions due to lockdown. There is nothing to indicate that the parties can invoke force majeure clause for completely absolving themselves from performance of the contract. The memorandum dated 13.05.2020 reads thus:-

> "4…….Therefore, after fulfilling due procedure and wherever applicable, parties to the contract may invoke FMC for all construction/works contract, goods and services contract and PPP contracts with Government agencies and in such event date for completion of contractual obligations which had to be completed on or after 20th February, 2020 shall extend for a period of not less than three months and not more than six months without imposition of any cost or penalty on the contractor/concessionaire….

> 5. …. It is further clarified that invocation of FMC does not absolve all non-performance of a party to the contract, but only in respect of such non-performance as is attributable to a lockdown situation or restrictions imposed under any Act or executive order of the Government/s on account of Covid-19 global pandemic. It may be noted that, subject to above stated, all contractual obligations shall revive on completion of the period."

Under the Contract Law, an act of God is seen as a defence to excuse the performance of contractual obligations arising out of infringement of conditions of contract or impossibility or impracticability to perform the contract. Thus, even though words "pandemic" and "implementation of Act of 2005" are not specifically mentioned in Clause 48 but the purport of the said clause where it speaks about "implementation of liquor prohibition policy", "act of God", "natural calamity" or for "any other reason" leading to closure of liquor vends in the State lends a wide scope for the applicability of Clause 48 of the policy in the pandemic circumstances. In other words, Clause 48 of the policy expressly saves the compliance of the contract against the breach of the policy on account of "act of God" and also against "natural calamities". In this view of the matter, it would not be out of place to hold that the Covid-19 pandemic or epidemic falls within the meaning and term of "natural calamity" and hence, being a "force majeure" event expressly covered by Clause 48 of the Policy, which in the present case was impliedly within the contemplation of the parties and so its consequences. Thus, we do not find any force in the argument advanced on behalf of the petitioners that the force majeure event was neither within the contemplation of the parties and nor expressly or impliedly provided for in the Excise Policy.

94. It was also argued on behalf of the petitioners that in order that Clauses 48 and 49 of the policy and Clause XXXIII of the General Licence Conditions are made applicable to the petitioners, such event of "act of God" or "natural calamity" must have occurred during the licence period but since no licence was issued to the petitioners as on the date of declaration of Covid-19 as pandemic or before the commencement of the licence period i.e. 01.04.2020, therefore, the said clauses shall not be applicable to the case of the petitioners. As already observed, strictly even if the status of the petitioners as on the date of commencement of the licence as per the policy period i.e. 01.04.2020, may not have been as that of a licensee but the acceptance of the offer of the

petitioners, which was communicated to them vide Annexure P-2, had the effect of binding them to the contract. Thus, Clause 48 of the policy is squarely applicable in the present case.

95. Now, what needs to be seen is the applicability of Section 56 of the Contract Act to the facts and circumstances of the present case. The issue regarding performance of the contract becoming impossible or unlawful, covered under Section 56 of the Contract Act, has been subject matter of interpretation in various pronouncements. We proceed to examine the case law.

96. In the decision in **Taylor vs. Caldwell (supra)**, which has been referred to by the learned senior counsel for the petitioners, it has been held that the contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. The relevant paragraphs of the said decision reads as under:-

> "After the making of the agreement, and before the first day on which a concert was to be given, the Hall was destroyed by fire. This destruction, we must take it on the evidence, was without the fault of either party, and was so complete that in consequence of the concerts could not be given as intended. And the question we have to decide is whether, under these circumstances, the loss which the plaintiffs have sustained is to fall upon the defendants. The parties when framing their agreement evidently had not present to their minds the possibility of such a disaster, and have made no express stipulation with reference to it, so that the answer to the question must depend uon the general rule of law applicable to such a contract.
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> *** *** ***
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> ……….The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.
>
> In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given, that being essential to their performance.
>
> We think, therefore, that the Music Hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the hall and Gardens and other things.

> Consequently the rule must be absolute to enter the verdict for the defendants."

The ratio laid down in **Taylor vs. Caldwell (supra)** relied upon by the learned senior counsel for the petitioners is not applicable in the present case. In the said case the parties when framing their agreement had made no express stipulation with reference to possibility of any disaster. However, in the present case, the consequences of non-performance of the contract are clearly depicted in Clause 48, 49 and 54 of the policy. In the said decision, apart from absence of express stipulation in the contract, Music Hall for which the agreement was entered, had been completely perished and there was no continued existence of the thing contracted for, whereas, here, the liquor vends for which the contract has been entered into between the parties, temporarily, for about two months, ceased to operate due to Covid-19 pandemic. Thus, the decision in **Taylor vs. Caldwell**'s case (**supra**) is distinguishable on facts.

97. The judgment in the case of **Satyabrata Ghose's case (supra)** has been relied upon by the petitioners and respondents both, wherein, the Court has considered the word "impossible" occurring in Section 56 of the Contract Act and held that it is to be considered in its practical sense and not in literal sense. The relief is given by the court on the ground of subsequent impossibility when it finds that the whole purpose or basis of a contract was frustrated by the occurrence of an unexpected event which was beyond what was contemplated by the parties at the time when they entered into the agreement. It was, however, made clear that if the parties do contemplate the possibility of an intervening circumstance which might affect the performance of the contract, but expressly stipulate that the contract would stand despite such circumstance, there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event. The relevant extract of the judgment reads as under:-

> "16. In the latest decision of the House of Lords referred to above, the Lord Chancellor puts the whole doctrine upon the principle of construction. But the question of construction may manifest itself in two totally different ways. In one class of cases the question may simply be, as to what the parties themselves had actually intended; and whether or not there was a condition in the contract itself, express or implied, which operated,

according to the agreement of the Parties themselves to release them from their obligations; this would be a question of construction pure and simple and the ordinary rules of construction would have to be applied to find out what the real intention of the parties was. According to the Indian Contract Act, a promise may be express or implied *(vide Section 9)*. In cases, therefore, where the court gathers as a matter of construction that the contract itself contained impliedly or expressly a term, according to which it would stand discharged on the happening of certain circumstances, the dissolution on of the contract would take place under the terms of the contract itself and such cases would be outside the purview of section 56 altogether. Although in English law these cases are treated as cases of frustration, in India they would be dealt with under section 32 of the Indian Contract Act which deals with contingent contracts or similar other provisions contained in the Act. In the large majority of cases however the doctrine of frustration is applied not on the ground that the parties themselves agreed to an implied term which operated to release them from the performance of the contract. The relief is given by the court on the ground of subsequent impossibility when it finds that the whole purpose or basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. Here there is no question of finding out an implied term agreed to by the parties embodying a provision for discharge, because the parties did not think about the matter at all nor could possibly have any intention regarding it. When such an event or change of circumstance occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the court which can pronounce the contract to be frustrated and at an end. The court undoubtedly has to examine the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence, but evidence only on which the court has to form its own conclusion whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object *(vide Morgan v. Manser, 1947 AER Vol. II, p.666)*. This may be called a rule of construction by English Judges but it is certainly not a principle of giving effect to the intention of the parties which underlies all rules of construction. This is really a rule of positive law and as such comes within the purview of section 56 of the Indian Contract Act.

17. It must be pointed out here that if the parties do contemplate the possibility of an intervening circumstance which might affect the performance of the contract, but expressly stipulate that the contract would stand despite such circumstances, there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens. As Lord Atkinson said in *Matthey v. Curling (1922) 2 AC 180 at 234*, "a person who expressly contracts absolutely to do a thing not naturally impossible is not excused for nonperformance because of being prevented by the act of God or the King's enemies......... or vis major". This being the legal position, a contention in the extreme form that the doctrine of frustration as recognised in English law does no come at all within the purview of section 56 of the Indian Contract Act cannot be accepted."

"(emphasis supplied)"

However, examining the disturbing element, which alleged to have substantially prevented the performance of the contract as a whole, the Court held as under:-

> "**23**. The company, it must be admitted, had not commenced the development work when the requisition order was passed in November, 1941. There was no question, therefore, of any work or service being interrupted for an indefinite period of time. Undoubtedly the commencement of the work was delayed but was the delay going to be so great and of such a character that it would totally upset the basis of the bargain and comercial object which the parties had in view? The requisition orders, it must be remembered, were; by their very nature, of a temporary character and the requisitioning authorities could, in law, occupy the position of a licensee in regard to the requisitioned property. The order might continue during the whole period of the war and even for some time after that or it could have been withdrawn before the war terminated. If there was a definite time limit agreed to by the parties within which the construction work was to be finished, it could be said with perfect propriety that delay for an indefinite period would make the performance of the contract impossible within the specified time and this would seriously affect the object and purpose of the venture. But when there is no time limit whatsoever in the contract, nor even an understanding between the parties on that point and when during the war the parties could naturally anticipate restrictions of various kinds which would make the carrying on of these operations more tardy and difficult than in times of peace, we do not think that the order of requisition affected the fundamental basis upon which the agreement rested or struck at the roots of the adventure."

98. In **Mary**'s case **(supra)**, referred to on behalf of the respondents, the Supreme Court observed that Rule 5(15) of the Rules in question i.e. Kerala Abkari Shops (Disposal in Auction) Rules 1974, clearly provided that on the failure of the auction-purchaser to execute the agreement, the deposit already made towards earnest money and security money shall be forfeited. The relevant paragraphs of the said decision read as under:-

> "17. In view of second paragraph of Section 56 of the Contract Act, a contract to do an act which after the contract is made, by reason of some event which the promissory could not prevent becomes impossible, is rendered void. Hence, the forfeiture of the security amount may be illegal. But what would be the position in a case in which the consequence for non-performance of contract is provided in the statutory contract itself? The case in hand is one of such cases.
>
> 18. The doctrine of frustration excludes ordinarily further performance where the contract is silent as to the position of the parties in the event of performance becoming literally impossible. However, in our opinion, a statutory contract in which party takes absolute responsibility cannot escape liability whatever may be the reason. In such a situation, events will not discharge the party from the consequence of non-performance of a contractual obligation. Further, in a case in which the consequences of non-performance of contract is provided in the statutory contract itself, the parties shall be bound by that and cannot take shelter behind Section 56 of the Contract Act, 1872. Rule 5(15) in no uncertain terms provides that "on the failure of the auction-purchaser to make such deposit referred to in sub-rule 10" or "execute such agreement temporary or permanent" "the deposit already made by him towards earnest money and security shall be forfeited to Government". When we apply the aforesaid principle we find that the appellant had not carried out several obligations as provided in sub-rule (10)

of Rule 5 and consequently, by reason of sub-rule (15), the State was entitled to forfeit the security money."

99. Thus, in **Satyabrata Ghose** (supra), which has been relied upon by both the parties and **Mary**'s case (supra) relied upon by the respondents it has been made clear in so many words that if the parties do contemplate the possibility of an intervening circumstance which might affect the performance of the contract, but expressly stipulate that the contract would stand despite such circumstance, there can be no case of frustration because the basis of the contract was to demand performance despite the happening of a particular event. The same principle has been reiterated by the Supreme Court in its recent pronouncements in **Energy Watchdog** and **South East Asia Marine Engineering and Constructions Ltd**.'s cases (**supra**).

100. In the case of **Energy Watchdog (supra),** which has been relied upon by both the parties, the Supreme Court reiterating its earlier judgment in **Satyabrata Ghose**'s case **(supra**), has given exhaustive consideration to the doctrine of frustration and when it can be invoked. The relevant extracts of the said decision, read as under:-

> "34. "Force Majeure" is governed by the Contract Act, 1872. Insofar as it is relatable to an express or implied clause in a contract, such as the PPAs before us, it is governed by Chapter III dealing with the contingent contracts, and more particularly, Section 32 thereof. Insofar as a force majeure event occurs dehors the contract, it is dealt with by a rule of positive law under Section 56 of the Contract Act…….
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> *** *** ***
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> 37. <u>In Alopi Parshad & Sons Ltd. v. Union of India, (1960) 2 SCR 793, this Court, after setting out Section 56 of the Contract Act, held that the Act does not enable a party to a contract to ignore the express covenants thereof and to claim payment of consideration, for performance of the contract at rates different from the stipulated rates, on a vague plea of equity. Parties to an executable contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, for example, a wholly abnormal rise or fall in prices which is an unexpected obstacle to execution. This does not in itself get rid of the bargain they have made</u>……..
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> *** *** ***
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> 47. ……..Consequently, we are of the view that neither Clause 12.3 nor 12.7, referable to Section 32 of the Contract Act, will apply so as to enable the grant of compensatory tariff to the respondents. Dr. Singhvi, however, argued that even if Clause 12 is held inapplicable, the law laid down on frustration under Section 56 will apply so as to give the respondents the necessary relief on the ground of force majeure. Having once held that clause 12.4 applies as a result of which rise in the price of fuel cannot be regarded as a force majeure event contractually, it is difficult to appreciate a submission that in the alternative Section 56 will apply. <u>As has been held in</u>

> particular, in Satyabrata Ghose v. Mugneeram Bangur & Co., AIR 1954 SC 44, when a contract contains a force majeure clause which on construction by the Court is held attracted to the facts of the case, Section 56 can have no application. On this short ground, this alternative submission stands disposed of."
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> (Emphasis supplied)

101. In the judgment relied upon on behalf of the petitioners rendered in **South East Asia Marine Engineering**'s case **(supra)**, the contract between the parties was for well drilling and other auxiliary operations in Assam. When the prices of High Speed Diesel, which was essential material for carrying out the said work, increased, the appellant claimed that it triggered the "change in law" clause under the contract and the respondent became liable to reimburse them for the same. The dispute was referred to an arbitral tribunal and ultimately, travelled to the Supreme Court. Relying upon the decision in **Satyabrata Ghose** (supra), the Supreme Court held as under:-

> **"23.** When the parties have not provided for what would take place when an event which renders the performance of the contract impossible, then Section 56 of the Contract Act applies. When the act contracted for becomes impossible, then under Section 56, the parties are exempted from further performance and the contract becomes void…..

102. Thus, the reliance placed by the petitioners upon the judgment in **South East Asia Marine Engineering**'s case **(supra)**, is misconceived as the said decision also spells out that Section 56 of the Contract Act applies only when the parties have not provided for as to what would happen when the contract becomes impossible to perform.

103. Relying upon the judgment of the Supreme Court in **Kenneth Builders and Developer**' case (**supra**), it was contended on behalf of the petitioners that the respondents had not provided a clear passage to the petitioners even though beyond their contemplation due to an intervening circumstance and therefore, it had frustrated the implementation of the contract. The said judgment casts light upon the words "impossibility" and "impossible" in relation to Section 56 of the Contract Act, wherein, the Supreme Court relying upon **Satyabrata Ghose**'s case (supra) held as under:-

> "31. Insofar as the present case is concerned, DDA certainly did not contemplate a prohibition on construction activity on the project land which

would fall within the Ridge or had morphological similarity to the Ridge. It is this circumstance that frustrated the performance of the contract in the sense of making it impracticable of performance.

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33. It is one thing for DDA to now contend before us that Kenneth Builders could have applied to the Ridge Management Board for permission to carry out development activity and also approached this Court for necessary permission but it is another thing to say that these requirements were not within the contemplation of DDA and certainly not within the contemplation of Kenneth Builders. For a statutory body like DDA to contend that in the face of the legal position (with which DDA obviously does not agree), Kenneth Builders ought to have persisted and perhaps initiated or invited litigation cannot be appreciated.

34. When DDA informed Kenneth Builders that the project land was available on an "as is where is basis" and that it was the responsibility of the developer to obtain all clearances, the conditions related only to physical issues pertaining to the project land and ancillary or peripheral legal issues pertaining to the actual construction activity, such as compliance with the building bye-laws, environmental clearances etc. The terms and conditions of "as is where is" or environmental clearances emphasized by the learned counsel for DDA certainly did not extend to commencement of construction activity prohibited by law except after obtaining permission of the Ridge Management Board and this Court. On the contrary, it was the obligation of DDA to ensure that the initial path for commencement of construction was clear, the rest being the responsibility of the developer. The failure of DDA to provide a clear passage due to an intervening circumstance beyond its contemplation went to the foundation of implementation of the contract with Kenneth Builders and that is what frustrated its implementation."

(emphasis supplied)

In our view, the judgment in **Kenneth Builders and Developer**' case (supra) is not applicable to the case of the petitioners for the reason that in the facts of the said case, in the agreement, the DDA had not contemplated a prohibition on construction activity on the project land, which circumstance had frustrated the performance of the contract.

104. Thus, it can be safely held that by virtue of Clause 48 of the Excise Policy 2020-21, the "force majeure" condition was expressly and impliedly within the contemplation of the parties and therefore, Section 56 of the Contract Act cannot be invoked, as in the present case, the petitioners have agreed to their obligations by submitting an affidavit that they would be bound by the terms and conditions of the Excise Policy 2020-21.

105. Learned senior counsel for the petitioners then contended that Clause 48 of the policy only relates to compensation and rebate not being available to the licensees in the event of closure of their shops due to liquor prohibition

policy, natural calamities or for any other reason but it does not even remotely states that the refund of the earnest money will not be granted. In the first place, Clause 48 not only speaks about the compensation but also about not extending any rebate to the objector/licensee on account of decision, if any, taken for re-auctioning the liquor shop. Secondly, the said argument would not help the cause of the petitioners as the provision in respect of earnest money is separately provided in Clause 9.6 of the policy, which stipulates that the successful bidder, who participated in the e-tender process, cannot later draw back from the process of auction otherwise, the amount deposited by him shall be forfeited and legal proceedings will be initiated against him. Clause 9.4 of the policy also provides for the manner and time in which the earnest money was to be deposited and in case there is default in depositing remaining amount of earnest money within the prescribed time limit, the offer shall be cancelled and such liquor shops group/single group re-auctioned. Undoubtedly, in terms of Clause 54 of the policy, there is no impediment for the petitioners to seek refund of the amount so deposited towards process fee/conditions for allotment of liquor shop in case any unavoidable circumstance arises due to which the auction process is required to be cancelled. Similarly, Clause 49 also provides for seeking waiver by the licensee in case he is unable to pay the minimum excise duty on account of closure of shop due to social, political, legal reasons and lack of sales. It was contended on behalf of the petitioners that the policy of the previous year had provided certain benefits to the earlier liquor vends under Clauses 49 and 54 of the policy. However, there is nothing to indicate that any such steps had been taken by the petitioners but the request was not considered.

106. Again an alternative submission of the learned senior counsel for the petitioners was that even if Clause 48 of the policy is taken to be as a “force majeure” clause, then also the agreement stood frustrated and therefore, the petitioners are excused from its performance. This submission was tried to be substantiated by raising various arguments. Although in view of the finding recorded hereinabove that the provisions under Section 56 of the Contract Act do not apply in the present case, the question whether the contract between the parties had rendered unworkable, frustrated, impossible and unlawful to

perform has lost its significance but in all fairness, the controversy involved in the petition may be viewed from that angle as well.

107. Similar aspect of the matter received consideration by the House of Lords in **F.A. Tamplin Steamship Company**'s case (**supra**) wherein, by a time charter- party, a tank steamship was chartered for sixty months to be employed in lawful trades for voyages but after the outbreak of the war, when the charter-party had nearly three years to run, the steamer was requisitioned by the Admiralty and was employed in the transport of troops. The charterers who were willing to continue the agreed freight, contended that the charter-party was still subsisting. The majority view was that the interruption was not of such a character as that the Court ought to imply a condition that the parties should be excused from further performance of the contract and that the requisition did not determine or suspend the contract. The relevant paragraph of the said judgment reads, thus:-

> "Applying the principle to the present case, I find that these contracting parties stipulated for the use of this ship during a period of five years, which would naturally cover the duration of many voyages. Certainly both sides expected that these years would be years of peace. They also expected, no doubt, that they would be left in joint control of the ship, as agreed, and that they would not be deprived of it by any act of State. But I cannot say that the continuance of peace or freedom from an interruption in their use of the vessel was a tacit condition of this contract. On the contrary, one at all events of the parties might probably have thought, if he thought of it at all, that war would enhance the value of the contract, and both would have been considerably surprised to be told that interruption for a few months was to release them both from a time charter that was to last five years. <u>On the other hand, if the interruption can be pronounced, in the language of Lord Blackburn already cited, "so great and long as to make it unreasonable to require the parties to go on with the adventure," then it would be different. Both of them must have contracted on the footing that such an interruption as that would not take place, and I should imply a condition to that effect. Taking into account, however, all that has happened, I cannot infer that the interruption either has been or will be in this case such as makes it unreasonable to require the parties to go on. There may be many months during which this ship will be available for commercial purposes before the five years have expired. It might be a valuable right for the charterer during those months to have the use of this ship at the stipulated freight. Why should he be deprived of it? No one can say that he will or that he will not regain the use of the ship, for it depends upon contingencies which are incalculable. The owner will continue to receive the freight he bargained for so long as the contract entitles him to it, and if, during the time for which the charterer is entitled to the use of the ship, the owner received from the Government any sums of money for the use of her, he will be accountable to the charterer. Should the upshot of it all be loss to either party—and I do not suppose it will be so – then each will lose according as the action of the Crown has deprived either of the benefit he would otherwise have derived from the contract.</u> It may be hard on them as it was on the plaintiff in

> Appleby v. Myers L.R.2 C.P. 651. The violent interruption of a contract always may damage one or both of the contracting parties. Any interruption does so. Loss may arise to some one whether it be decided that these people are or that they are not still bound by the charterparty. But the test for answering that question is not the loss that either may sustain. It is this: Ought we to imply a condition in the contract that an interruption such as this shall excuse the parties from further performance of it? I think not, I think they took their chance of lesser interruptions and the condition I should imply goes no further than that they should be excused if substantially the whole contract became impossible of performance, or in other words impracticable, by some cause for which neither was responsible. Accordingly I am of the opinion that this charterparty did not come to an end when the steamer was requisitioned and that requisition did not suspend it or affect the rights of the owners or charterers under it, and that the appeal fails."
>
> (emphasis supplied)

Analysing the judgment in **F.A. Tamplin Steamship Company**'s case (**supra**) it may be noted that it was held therein that if the interruption in the performance of a contract can be pronounced so as to make it unreasonable to require the parties to go on with the adventure then it may excuse the parties from further performance of the contract but in the facts of the said case it was found that the interruption was not of such a character as that the Court ought to imply that condition.

108. In **Satyabrata Ghose**'s case (**supra**), the Supreme Court held that the word "impossible" occurring in Section 56 of the Contract Act is to be considered in its practical sense and not in literal sense. The Court was of the view that the subsequent impossibility to perform the contract should mean that whole purpose or basis of a contract is frustrated by the occurrence of an unexpected event which was beyond the contemplation of the parties at the time of agreement. The relevant paragraph of the said judgment reads, thus:-

> "9. The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general, and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment. This much is clear that the word "impossible" has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upset the very foundation upon which the parties rested their bargain, it can very well be said that the promisor found it impossible to do the act which he promised to do.

> *** *** ***
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> 15. These differences in the way of formulating legal theories really do not concern us so long as we have a statutory provision in the Indian Contract Act. In deciding cases in India the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in section 56 of the Contract Act, taking the word "Impossible" in its practical and not literal sense. It must be borne in mind, however, that section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties."
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> (emphasis supplied)

109. The judgment in **Smt. Sushila Devi**'s case **(supra**) was relied upon by the learned counsel for the petitioners to contend that the impracticability to perform or uselessness of the contract should be determined on the basis of the object and purpose the parties had in view at the time of entering into the contract. In the said judgment, the question for consideration relatable to the present case, was that whether the doctrine of frustration of contract was limited to cases of physical impossibility. In the facts of the said case, on account of criminal disturbances following partition of India, after agreement of lease with the respondent-highest bidder, who as per the agreement, was liable to execute and register the lease deed in favour of Vidyawati, it was not possible for either party to give effect to the lease agreement for the lands situated in Gujranwala, which became part of Pakistan. The respondent sued the appellants - legal heirs of Vidyawati, for return of the amount deposited and damages. The suit was decreed and the High Court also affirmed the decree. The matter travelled to the Supreme Court. In para-11, it was held that the performance of the contract has become impossible because having regard to the object and purpose the parties had in view the contract became impracticable or useless. However, the Court made it clear that the supervening events should be such that take away the very basis of the contract and it should be of such a character that it strikes at the root of the contract. This finding completely ousts the stand of the petitioners that the impossibility should be determined on the basis of the object and purpose the parties had in view at the time of agreement. The relevant paragraph of the said judgment, reads as under:

> "11. In our opinion, on this point the conclusion of the appellate court is not sustainable. But in fact, as found by the trial court as well as by the appellate court, it was impossible for the plaintiffs to even get into Pakistan. Both the trial court as well as the appellate court have found that because of

> the prevailing circumstances, it was impossible for the plaintiffs to either take possession of the properties intended to be leased or even to collect rent from the cultivators. For that situation the plaintiffs were not responsible in any manner. As observed by this Court in Satyabrata Ghose v. Mugneeram Bangur and Company, AIR 1954 SC 44, the doctrines of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. The view that Section 56 applies only to cases of physical impossibility and that where this section is not applicable recourse can be had to the principles of English law on the subject of frustration is not correct. Section 56 of the Indian Contract Act lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. The impossibility contemplated by Section 56 of the Contract Act is not confined to something which is not humanly possible. If the performance of a contract becomes impracticable or useless having regard to the object and purpose the parties had in view then it must be held that the performance of the contract has become impossible. But the supervening events should take away the basis of the contract and it should be of such a character that it strikes at the root of the contract."
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> (emphasis supplied)

110. In **Energy Watchdog**'s case (supra) which has been relied upon by both the parties, the Supreme Court in view of its earlier judgment in ***Naihati Jute Mills Ltd. vs. Khyaliram Jagannath, AIR 1968 SC 522*** has held that Courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events. For Section 56 to apply, the entire contract must become impossible to perform. The Court held as under:-

> "38. Similarly, in Naihati Jute Mills Ltd. vs. Khyaliram Jagannath, AIR 1968 SC 522, this Court went into the English law on frustration in some detail, and then cited the celebrated judgment of Satyabrata Ghose v. Mugneeram Bangur & Co. Ultimately, this Court concluded that a contract is not frustrated merely because the circumstances in which it was made are altered. The courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events.
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> *** *** ***
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> 47. We are, therefore, of the view that neither was the fundamental basis of the contract dislodged nor was any frustrating event, except for a rise in the price of coal, excluded by Clause 12.4, pointed out. Alternative modes of performance were available, albeit at a higher price. This does not lead to the contract, as a whole, being frustrated….."

111. In **Joshi Technologies**' case (**supra**), the Supreme Court in very unambiguous terms has held that it cannot ever be that a licensee can work out the license if he finds it profitable to do so and challenge the conditions

under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business. The relevant observations read, thus:-

> "70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the license if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business."

112. Thus, in all the above referred cases i.e. **F.A. Tamplin (supra)**, **Satyabrata Ghose** (**supra**), **Smt. Sushila Devi (supra**), **Energy Watchdog** (**supra**) and **Joshi Technologies**' case (**supra**) so far as they have dealt with the issue pertaining to frustration of the contract, it has been commonly held that the impossibility to perform a contract must be a practical impossibility so much so that the whole purpose or basis of a contract or the entire contract gets frustrated and the impossibility or frustration should strike at the root of the contract.

113. Keeping the said unanimous principles laid down in the aforesaid decisions, we shall now examine whether the contract between the parties had become unworkable, impossible, frustrated and unlawful to perform as was contended by the learned counsel for the petitioners. The direction to shutdown the liquor vends in the respective Districts was initially issued through the District Magistrates in the entire State w.e.f. 21st March, 2020. This was done to avoid the spread of Covid-19 by maintaining social distancing and it marginally affected the licensees for the previous year 2019-20 while did not allow the successful bidders, whose offers were accepted against the Excise Policy 2020-21, to operate their liquor vends w.e.f. 01.04.2020 when the period of licence was to commence. It was a common ground that even the licences could not be issued to the successful bidders before 01.04.2020 after the communication of the acceptance letters was already made to them. Thereafter, Nation-wide lockdown was effected from 25th March, 2020, which was extended till 03rd May, 2020. On 02nd May, 2020, the State Government took a decision to open the liquor vends and started issuing the licences to the successful bidders in whose favour the

allotment/acceptance letters had already been issued in the month of March, 2020 before declaration of the Nation-wide lockdown. This was the time when the present petitions were filed on 02nd May, 2020. Since the lockdown was still in force, as it was further extended, therefore, the respondents provided the licences on the email IDs provided by the successful bidders, which is nowadays a preferred mode of official communication and is in vogue in all the Government Departments as well.

114. While issuing the licences to all the petitioners vide letter dated 02nd May, 2020 (Annexure A-2 to IA No.3995/2020), the petitioners were also asked to collect the original licences and complete the remaining formalities for the licence period 2020-21. As is apparent from letter dated 04th May, 2020 (Annexure A-4 to IA No.3995/2020) issued by the Department of Commerce, State of M.P., all the liquor shops in the three red-zones districts i.e. Bhopal, Indore and Ujjain were directed to remain close while in other red-zone districts i.e. Jabalpur, Dhar, Badwani, East Nimar (Khandwa), Dewas and Gwalior, the liquor shops, which did not fall in the urban/city area, were allowed to open. The shops falling in orange zones i.e. Khargone, Raisen, Hoshangabad, Ratlam, Aagar-Malwa, Mandsaur, Sagar, Shajapur, Chhindwara, Alirajpur, Tikamgarh, Shahdol, Sheopur, Dindori, Burhanpur, Harda, Betul, Vidisha, Morena and Rewa were allowed to run in all areas except the areas falling in the containment zones whereas the shops of green zone Districts were allowed to run in complete districts from 7.00 a.m. to 7.00 p.m. with certain restrictions like social distancing, restricted timings and prohibition on opening of bars/Ahatas, receptions/marriages etc. having more than 20 people were also directed to be imposed under the SOPs issued by the Department of Home, Govt. of India and the Excise Department as mentioned in the said letter. The same order dated 04th May, 2020 has been placed on record by the respondents with their return as Annexure R-3.

115. The aforesaid exercise was continued and ultimately, from 02nd June, 2020 onwards, all the liquor vends falling in red zones have also been allowed to be operated, however, while the timings for closing the shops have been intermittently extended upto 9 p.m. but the restrictions as before have been

directed to be continued. In this view of the matter, it is clear that in the red-zone districts i.e. Indore, Bhopal and Ujjain the shops remained completely closed for about two months till 01st June, 2020 while in other red zone districts including Jabalpur and Gwalior, the shops in the urban/city areas have remained closed upto 01st June, 2020 but the shops which did not fall in the urban/city areas, had been allowed to be opened from 04th May, 2020. After an interim order was passed on 04th June, 2020, except the petitioners in this batch of writ petitions, who are 57 liquor groups as stated by the learned counsel for the respondents, and have surrendered their licences, as many as 323 liquor groups for the policy year 2020-21 have continued with their licences and have been operating the liquor vends. The plea of the petitioners seeking avoidance of the performance of the contract on the basis of revenue involved rather than the number of allottees/licensees who are operating the liquor vends does not depict that it has become impossible or unlawful to carry on the trade of liquor for the remaining period. In this manner, there has been closure of liquor business in red zone districts Indore, Bhopal and Ujjain and other red zone districts like Jabalpur, Dhar, Badwani, East Nimar (Khandwa), Dewas and Gwalior in the urban/city areas for about two months and five days for the liquor vends which were allotted by way of renewal and just about two months for the liquor vends which were allotted through auction. In other zones, the liquor vends were allowed to run in urban/city areas except containment zones and rural areas with restrictions and some of the petitioners have run the liquor vends from the date of permission granted in that behalf i.e. 04th May, 2020 on the basis of the licences issued to them and under the protective orders and assurance given by the learned counsel for the respondents at the bar during pendency of the petitions that no coercive steps shall be taken against the petitioners.

116. Thus, the overall operation of the liquor vends could be said to be in disarray for only about two months during which period also the liquor shops of red zones were also allowed to be opened from 04th May, 2020 except for the urban/city areas and three red zones of Bhopal, Indore and Ujjain. Therefore, it is not the case where the whole contract had got frustrated and become impossible to perform. It is to be borne in mind that the contract is for

the period 01.04.2020 to 31.03.2021 and about three quarters of business is still left. Further, vide amended Notification, an option was also given to the licensees to extend the period of licence by two months i.e. till 31.05.2021, which would in the long run also compensate the petitioners to make up the loss caused in the initial two months of the policy period. Thus, the point raised by the learned counsel for the petitioners that full 12 months are not available to the petitioners, no longer survives. The argument that full 14 hours of sale period was not made available to the petitioners also does not stand as by order dated 31.05.2020, the time for opening the shops was fixed as 7.00 a.m. to 9.00 p.m. i.e. 14 hours.

117. There are other mitigating circumstances conversed to so-called frustration of the contract, as the respondents have placed on record that the State vide order dated 31.03.2020 (Annexure R-4) has granted several relaxations and waivers of licence fee etc. and this fact has already been noted above in paragraph 13 of this order. It was also placed on record that the revenue of Rs.12,000 Crore was expected for the year 2020-21 and the State would forego a revenue of around Rs.1,200 Crore in the month of April, 2020 and similar substantial loss in the following month on account of those waivers being given to the petitioners but still the State was trying to accommodate the licensees so as to meet the exigencies occurred due to pandemic. It was submitted that the maximum retail price of the domestic as well as foreign liquor was increased, which would benefit the licensees to overcome the loss caused to them.

118. Additionally, as regards the restrictions on opening of shop bars/*Ahatas*, on the basis of a chart produced as Annexure R-5, it was submitted by the respondents that in the year 2017-18, total 149 shop bar licences were given. The said facility was withdrawn in the year 2018-19 but still the annual value of liquor shops in the entire State rose to at an average of 20% and overall rise in the State was recorded at an average of 14.7%. Even otherwise, in terms of Clause 2 of the Excise Policy 2020-21, the licences for the shop bars/*Ahatas* facility are given after charging additional

licence fee as an option as per the rules. The Clause 2 of the Excise Policy 2020-21 is reproduced as under:-

> "2. **शॉपबार** – राज्य में स्थित ऑफ श्रेणी की देशी/विदेशी मदिरा की दुकानों को नियमानुसार पात्रता होने पर, विकल्प के रूप में अतिरिक्त मूल्य प्रभारित कर शॉप बार लाइसेंस के माध्यम से ऑन श्रेणी में परिवर्तित किया जायेगा ।
>
> **देशी/विदेशी मदिरा दुकानों में शॉप बार हेतु निर्धारित फीसः–**
>
> वर्ष 2020–21 हेतु शॉपबार लायसेंस हेतु वार्षिक लायसेंस फीस मदिरा दुकान के वार्षिक मूल्य का 2 प्रतिशत रखा जायेगा एवं इस वार्षिक लायसेंस फीस के विरूद्ध मदिरा का प्रदाय अनुमत नहीं किया जायेगा ।"
>
> "(1) **विदेशी मदिरा दुकानेां में शॉपबार हेतु निर्धारित मापदंडः–"**
>
> 1.. से 11. ....
>
> (2) **देशी मदिरा दुकानों में शॉपबार हेतु निर्धारित मापदंडः–"**
>
> 1... से 10. ...."

119. The shop bars/*Ahata* facility is given on payment of additional licence fee and is optional, therefore, merely because restriction has been imposed on such facility, it would not mean that for the lack of such facility the entire contract stands frustrated, rather the Excise Policy 2020-21 and the General Licence Conditions also empower the State to change the conditions of the policy and the licence during the currency of the policy and licence period. The petitioners have not offered any explanation to the submissions advanced by the learned counsel for the respondents relating to the aforesaid waivers and relaxations granted by the State to accommodate the licensees and to enable them to operate the licences.

120. Still further, learned counsel for the petitioners had vehemently argued that due to spread of Covid-19 pandemic, extended lockdown and severe restrictions imposed in the aftermath of the lockdown, the object which the licensees had in view before entering into the contract has defeated as many buyers would keep away from liquor due to health reasons. In our considered opinion, such a ground may be good ground for suggesting about the hardships to perform a contract but not for claiming that the entire contract has become impossible, unworkable and practicable to perform. Similarly, the argument that since the opening of liquor vends during the lockdown was declared as an offence, therefore, the contract had become unlawful to perform has also no merit. As discussed above, only for about two months the

liquor vends in major cities like Indore, Bhopal, Gwalior, Jabalpur and Ujjain where the petitioners claim that in terms of revenue the assessment should be done, remained closed. Thus, it is not a case that substantially the entire contract has become impossible to perform.

121. The Supreme Court in **Kandath Distilleries**'s case **(supra)** has held that a citizen has no fundamental right to trade or business in liquor as a beverage. Such activities are res extra commercium and therefore, cannot be carried on by any citizen as a matter of right. The State can impose restrictions and limitations on trade or business in liquor as a beverage. The relevant paragraphs of the said decision are reproduced as under:-

> "24. Article 47 is one of the Directive Principles of State Policy which is fundamental in the governance of the country and the State has the power to completely prohibit the manufacture, sale, possession, distribution and consumption of liquor as a beverage because it is inherently dangerous to human health. Consequently, it is the privilege of the State and it is for the State to decide whether it should part with that privilege, which depends upon the liquor policy of the State. State has, therefore, the exclusive right or privilege in respect of portable liquor. A citizen has, therefore, no fundamental right to trade or business in liquor as a beverage and the activities, which are res extra commercium, cannot be carried on by any citizen and the State can prohibit completely trade or business in portable liquor and the State can also create a monopoly in itself for the trade or business in such liquor. This legal position is well settled. The State can also impose restrictions and limitations on the trade or business in liquor as a beverage, which restrictions are in nature different from those imposed on trade or business in legitimate activities and goods and articles which are res commercium. Reference may be made to the judgments of this Court in Vithal Dattatraya Kulkarni and Others v. Shamrao Tukaram Power SMT and Others (1979) 3 SCC 212, P. N. Kaushal & Others v. Union of India & Others (1978) 3 SCC 558, Krishna Kumar Narula etc. v. State of Jammu & Kashmir & Others AIR 1967 SC 1368, Nashirwar and Others v. State of Madhya Pradesh & Others (1975) 1 SCC 29, State of A. P. & Others v. McDowell & Co and Others (1996) 3 SCC 709 and Khoday Distilleries Ltd. & Others v. State of Karnataka & Others (1995) 1 SCC 574.
>
> 25. Legislature, in its wisdom, has given considerable amount of freedom to the decision makers - the Commissioner and the State Government since they are conferred with the power to deal with an article which is inherently injurious to human health."

122. Thus, keeping in view the ratio laid down by the Supreme Court in the series of decisions and after analysing the entire gamut of facts and circumstances, noted hereinabove, it cannot be said that the contract between the parties had become totally unworkable, impossible, frustrated and unlawful to perform. At the most it was a case of hardships and interruption in the operation of the liquor shops for about two months and therefore, the

petitioners cannot claim that they are excused from the performance of the contract.

123. Coming to question No.(v), though in W.P. Nos.7520, 7567, 7576, 7578, 8259 and 8260 of 2020, Clauses 9.6, 10.1.4, 10.1.5, 10.1.9, 44 and 48 of the Excise Policy 2020-21 dated 25.02.2020 have been challenged but no legal infirmity has been substantiated or violation of any statutory or Constitutional provision has been shown by the learned counsel for the petitioners appearing therein. Even otherwise, the petitioners having participated in the auction process being fully aware of the terms and conditions of the policy and on acceptance of their bids, legally enforceable contract/agreement having been entered, they cannot be heard to say that the particular clauses of the policy are illegal.

124. The question No.(vi) relates to the preliminary objections raised by the learned senior counsel for the respondents regarding maintainability of the writ petition and also that disputed questions of fact cannot be adjudicated in exercise of writ jurisdiction under Article 226 of the Constitution of India. Suffice it to notice that in view of our answers on merit to various issues involved in the writ petition, these points have been rendered academic and as such, are left open without expressing any opinion in the facts and circumstances of the case at this stage.

125. In view of the totality of the facts and circumstances of the case, we do not find that any illegality has been committed by the respondents which may warrant interfere in these writ petitions.

126. At this stage, it would be just to refer to the alternative plea raised by the parties on the strength of Clauses 48, 49 and 54 of the Excise Policy.

127. Clause 48 of the Policy does not provide any benefit to the petitioners if decision to close the liquor vends or re-auctioning the liquor vends is taken on account of any liquor prohibition policy or any loss is caused to the licensees on account of act of God or natural calamity. However, Clause 49 provides that consequent upon any social, political presentations or law and order situations, loss of sale of liquor can be compensated in equal proportion

of minimum bank guarantee after taking into account all the situations if the licensee of a particular area was unable to take the supply of liquor equivalent to minimum bank guarantee duty fixed for the licence year. Such decision to compensate or grant rebate in duty payable shall be taken by the State/Excise Commissioner on the basis of reasonable and factual proposal sent by the District committee. Under Clause 54 of the policy, there is no impediment for the petitioners to seek refund of the amount so deposited towards process fee/conditions for allotment of liquor shop in case any unavoidable circumstance arises due to which the auction process is required to be cancelled. However, no compensation is payable.

128. In view of the stand of the State that if the petitioners find that they are at a loss in operating the allotted liquor shops, they can opt to invoke Clause 49 of the Excise Policy to seek remission/waiver of Excise duty to the extent of loss, file an application to the District Committee provided thereunder who shall send a fact finding report to the State Government whereupon decision on waiver of Excise duty shall be taken, it shall be open for the petitioners to approach the competent Authority of the respondents invoking Clauses 49 and 54 of the Excise Policy 2020-21 and due to changed scenario and the fact and circumstances, the said Authority shall consider the claim of the petitioners sympathetically and take decision in accordance with law.

129. IA No.4141/2020 has been filed seeking action against the respondents for contempt of Court for violating the assurance given to this Court on 27.05.2020. In view of the reply filed controverting the claim of the petitioners, no action against the respondents is called for. The said IA stands *disposed of* accordingly.

130. In view of the aforesaid, all the writ petitions stand **disposed of**. Let a signed order be placed in the file of W.P. No.7373/2020 and copy whereof be placed in the file of connected cases.

(AJAY KUMAR MITTAL)
Chief Justice

(VIJAY KUMAR SHUKLA)
Judge

S/